Petition

81-2066

Office - Supreme Court, U.S.
FILED
MAY 4 1982
ALEXANDER L. STEVAS
CLERK

No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLES E. ANDERSON, Warden

Petitioner,

v

JACK E. HARLESS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Stephen F. Schuesler
Assistant Attorney General
774 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-8060

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1982

QUESTIONS PRESENTED FOR REVIEW

I.

WHERE NO CONSTITUTIONAL CLAIM WAS RAISED OR DECIDED ON APPEAL IN STATE COURT, CAN A HABEAS CORPUS PETITIONER BE DEEMED TO HAVE SATISFIED THE EXHAUSTION REQUIREMENT OF 28 USC § 2254(b), (c) MERELY BECAUSE HE RELIED UPON A STATE COURT OPINION WHICH ITSELF WAS NOT RESOLVED ON CONSTITUTIONAL GROUNDS?

II.

ASSUMING THAT STATE COURT REMEDIES ON POINT HAVE BEEN EXHAUSTED, WHETHER THE STATE COURT'S JURY INSTRUCTION ON MALICE BY ITSELF SO INFECTED THE ENTIRE TRIAL THAT THE RESULTING CONVICTIONS VIOLATE DUE PROCESS OF LAW?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
INDEX OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES & COURT RULES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
I. THIS CASE PRESENTS THE IMPORTANT FEDERAL QUESTION OF WHETHER A CONSTITUTIONAL CLAIM HAS BEEN FAIRLY PRESENTED TO THE STATE COURTS SO AS TO FULFILL THE EXHAUSTION REQUIREMENTS OF 28 USC § 2254(b) AND (c), WHERE THE CLAIM IN STATE COURT WAS THAT A JURY INSTRUCTION WAS REVERSIBLY ERRONEOUS, WITHOUT ANY RELIANCE UPON THE CONSTITUTION IN SUPPORT OF THAT CONTENTION	6
II. THE QUESTION OF WHAT CONSTITUTES EXHAUSTION UNDER 28 USC § 2254(b) AND (c) IS AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHICH THE COURTS OF APPEALS ARE IN CONFLICT AND WHICH SHOULD BE DECIDED BY THIS COURT	13

Page

III. THE NECESSITY OF RECONCILING SANDSTROM v MONTANA, 442 US 510 (1979) WITH CUPP v NAUGHTEN, 414 US 141 (1973) AND CHAPMAN v CALIFORNIA, 386 US 18 (1967) PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT 16

CONCLUSION 21

APPENDIX 23

INDEX OF AUTHORITIES

Cases	Page
Chapman v California 386 US 18 (1967)	16, 19, 20
Conner v Auger 595 F2d 407 (CA 8, 1979), *cert den* 444 US 851	15
Cupp v Naughten 414 US 141 (1973)	16, 17, 20
Gayle v LeFevre 613 F2d 21 (CA 2, 1980)	14
Harless v Anderson 504 F Supp 1135 (1981)	2
Johnson v Metz 609 F2d 1052 (CA 2, 1979)	13
Mabry v Klimas 448 US 444 (1980)	12, 16
Maher v People 10 Mich 212 (1862)	9
Minafee v Estelle 491 F2d 1096 (CA 5, 1974)	15
Paullet v Howard 634 F2d 117 (CA 3, 1980)	14
People v Berry 10 Mich App 469; 157 NW2d 310 (1968)	13
People v Bourne 385 Mich 170; 188 NW2d 573 (1971)	10
People v Harless 78 Mich App 745; 261 NW2d 41 (1977)	1, 6, 11
People v Martin 392 Mich 553; 221 NW2d 336 (1974)	8, 9, 10

Page

People v Wright
408 Mich 1; 289 NW2d 1 (1980) 13

Picard v Connor
404 US 270 (1971) 6, 11, 15, 16

Pitchess v Davis
421 US 482 (1975) 12, 16

Rose v Lundy
.... US ...., 50 LW 4272 (1982) 10, 16, 20

Sabino v LeFevre
630 F2d 919 (CA 2, 1980) 14

Sandstrom v Montana
442 US 510 (1979) 13, 16, 19, 20

Sumner v Mata (I)
449 US 539 (1981) 7

Sumner v Mata (II)
.... US ...., 50 LW 3760 (1982) 7

Thomas v Wyrick,
622 F2d 411 (CA 8, 1980), *cert den* 405 US 935 15

United States v Frady,
.... US ...., 50 LW 4388 (1982) 19

Wilks v Israel
627 F2d 32 (CA 7, 1980), *cert den* 449 US 1086 15

Wright v Bombard
638 F2d 457, (CA 2, 1980), *cert den* 405 US 935 14

Statutes:

28 USC § 1254(1) 2
28 USC § 2254(b) and (c) 1, 2, 3, 6, 10, 13, 16
MCLA 750.316; MSA 28.548 3

Other:

US Const, AM XIV 2

No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 198[illegible]

CHARLES E. ANDERSON, Warden

Petitioner,

v

JACK E. HARLESS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

On June 12, 1975, Respondent Harless was convicted by a jury in the Recorder's Court for the City of Detroit of two counts of first degree murder and was thereafter sentenced to life in prison. The Michigan Court of Appeals affirmed the convictions in *People* v *Harless*, 78 Mich App 745; 261 NW2d 41 (1977), a copy of which is appended to this Petition, 32a. The Michigan Supreme Court reviewed the record that had been before the Michigan Court of Appeals and, on June 21, 1979, denied without opinion Respondent's request for relief (30a). Thereafter, Respondent returned *in pro per* to Recorder's Court to file a delayed motion for new trial. The issue raised in that motion was unrelated to the questions presented in this Petition. That delayed Motion for New Trial was denied on September 24, 1979 (28a). The denial was not appealed.

On February 29, 1980, Respondent filed his Application for Writ of Habeas Corpus in United States District Court for the Eastern District of Michigan. On January 8, 1981, the District Court granted a conditional writ of habeas corpus unless Respondent be retried by the state within 90 days. *Harless* v *Anderson*, 504 F Supp 1135 (1981) 17a. On February 24, 1981, the District Court granted Petitioner's Application for Stay Pending Appeal (16a). On July 6, 1981, Respondent was granted release on bond pending appeal (14a). By opinion filed November 24, 1981, the Court of Appeals affirmed the judgment of the District Court granting habeas corpus relief (9a). In response to Petitioner's timely Motion for Rehearing and Suggestion For Rehearing En Banc, the Court of Appeals withdrew its first opinion and, on March 3, 1982, substituted a new opinion again affirming the judgment of the District Court (3a). On April 1, 1982, the Court of Appeals granted Petitioner's Motion for Stay of Mandate Pending Application for Certiorari (1a).

JURISDICTION

The opinion of the Court of Appeals which Petitioner seeks to have reviewed was entered March 3, 1982. This Court's jurisdiction is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

US Const, Am XIV, § 1, the Due Process Clause, provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

28 USC § 2254(b) and (c) provides:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

MCLA 750.316; MSA 28.548 provided:

"All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life."

STATEMENT OF THE CASE

In this habeas corpus proceeding, the District Court and the Court of Appeals held that a state court jury instruction on malice could have caused the jury to employ a conclusive presumption of malice from the use of a weapon, in violation of the due process clause of US Const, Am XIV. Both courts also held that Respondent had done all that was necessary to comply with the exhaustion requirements set forth in 28 USC § 2254(b) and (c).

Respondent was charged and convicted of the first degree murders of Thomas Champagne and Tom Tillinger in connection with the events which occurred in Detroit on July 12, 1974. On that date, there was an argument involving Respondent's family, the Champagne family, and Tom Tillinger. Respondent testified that as the argument progressed, he went into his house, took out his rifle, pulled a fan out of an upstairs window, and stood on the fan to fire on his victims. Although Respondent fired on moving targets, each of the fatally wounded victims was shot four times. A third victim who was not killed was struck once. Respondent claimed to have shot in defense of his son. This defense claim was the major issue at trial.

The state trial judge's instructions to the jury comprise some twenty pages of transcript (54-66a). The jury was correctly instructed on the presumption of innocence (55a), the prosecution's burden of proof beyond a reasonable doubt (55-56a), the possible verdicts of first degree, second degree murder, manslaughter and not guilty on each count (57a). The state trial judge instructed on the element of malice which distinguishes murder from manslaughter:

> "In this particular case in regard to the intentional killing or the alleged intentional killing, the Prosecutor argued that the use of a gun, the nature of the act, itself, is an act that carries a reasonable expectation of death.
>
> "You may determine in this case if death occurred as a result of the intentional use of a weapon, a gun—that the killing was done as a result of an intentional deliberate act.
>
> "You are obligated to take the nature of the act causing the death and determine whether or not death was a foreseeable consequence of that particular conduct. Murder is the killing with malice aforethought. Malice,

or the term malice, as used in murder, signifies an act done intentionally without legal justification or excuse.

"Members of the jury, the term malice is a technical term which has to do with the doing of a cruel act against another human being without excuse or justification. The doing of a cruel act against another human being without excuse or justification. Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion, but you must imply malice if you find death was implied by the use of a gun against another. The doing of a cruel act without excuse or justification." (58-59a)

The jury was instructed on the element of premeditation which differentiates first degree murder from second degree murder (59-60a). The jury was also correctly instructed that an intentional and unjustified killing may be found to constitute manslaughter if done in the face of adequate provocation (60-61a). The jury was correctly instructed that the prosecutor had the burden of proving beyond a reasonable doubt that Respondent had not acted lawfully in defense of self or others. (61-62a)

There were no objections to the jury instructions.

In his state appellate pleadings, Respondent Harless contended that the instructions on malice were "erroneous" and "entitled him to a new trial." The Michigan Court of Appeals characterized Respondent's claim as follows:

"Defendant first contends that the trial court committed reversible error by instructing the jury incorrectly on the implication of malice that might be drawn from defendant's use of a deadly weapon, the effect of which

was to remove the possible finding of manslaughter." 78 Mich App at 748; 261 NW2d at 43 (33a)

Respondent's entire argument on this issue in his Michigan appellate pleadings is appended to this Petition, (39-53a). Respondent's state court appellate pleadings in their entirety are a part of the record in this case. An examination of those pleadings discloses that none of Respondent's claims in state court was framed in constitutional terms. No provision of either state or federal constitution was cited. Nor did Respondent employ any shorthand reference such as "denial of due process" or even "unconstitutional" which might have signaled to the state courts that a constitutional issue was being presented.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS THE IMPORTANT FEDERAL QUESTION OF WHETHER A CONSTITUTIONAL CLAIM HAS BEEN FAIRLY PRESENTED TO THE STATE COURTS SO AS TO FULFILL THE EXHAUSTION REQUIREMENTS OF 28 USC § 2254(b) AND (c), WHERE THE CLAIM IN STATE COURT WAS THAT A JURY INSTRUCTION WAS REVERSIBLY ERRONEOUS, WITHOUT ANY RELIANCE UPON THE CONSTITUTION IN SUPPORT OF THAT CONTENTION.

28 USC § 2254(b) and (c) requires that the "same claim" sought to be vindicated in the federal habeas proceeding must first have been "fairly presented" to the state courts. *Picard* v *Connor*, 404 US 270, 275-276 (1971).

It is evident from the Michigan Court of Appeals' opinion

affirming Respondent's convictions that no constitutional claim was decided. It is further apparent from that opinion and the state court pleadings that no constitutional claim had been presented for decision.

The state court's characterization of the issue presented to it on appeal is tantamount to a factual determination that the claim was not constitutional in nature. That factual determination by a state appellate court was to be presumed correct. *Sumner* v *Mata* (I), 449 US 539 (1981); *Sumner* v *Mata* (II), ... US ...., 50 LW 3760 (3-22-82). The federal courts should therefore have explained in detail how the state court's characterization of the claim was not fairly supported by the record.

If there had been any doubt as to the nature of the claim presented to the Michigan court, the federal courts should have reviewed Harless' state filings to determine whether a constitutional claim had been fairly presented. This was not done. In its initial opinion of November 24, 1981, the Court of Appeals for the Sixth Circuit erroneously stated that it did not have before it Harless' state appellate papers. (10a). Petitioner promptly brought this error to the attention of the Court of Appeals in his Petition for Rehearing and Suggestion for Rehearing En Banc. The court's attention was directed to Docket Entry No. 8 (26a) which indicated that the "Appellate briefs in the State of Michigan" had been filed with the District Court and were therefore part of the record on appeal. Further, the Court of Appeals was informed in the Petition for Rehearing that Petitioner's counsel had been in telephone contact with the Court of Appeals clerk's office on or about December 2, 1981 and had been informed that the state appellate briefs were physically in the possession of the Court. In response to the Petition for Rehearing, the Court of Appeals withdrew its initial opinion, but in its substituted opinion incredibly repeated the erroneous deter-

mination that "we do not have before us Harless' state appellate papers." (4a). An examination of Respondent's state appellate pleadings would have indicated that none of the errors claimed therein was framed in constitutional terms. Not even a shorthand reference to the constitution, such as the phrase "denial of due process" or "unconstitutional" appears anywhere in Harless' or the prosecutor's state appellate pleadings. It is therefore understandable why the Michigan Court of Appeals did not decide a constitutional question. None was presented by the parties for decision.

As its sole basis for determining that the requirements of exhaustion had been met, the Court of Appeals noted that Respondent had relied in the state courts on the case of *People* v *Martin*, 392 Mich 553; 221 NW2d 336 (1974). It reasoned that the defendant in *Martin* had raised a constitutional claim which was characterized by the Sixth Circuit as "neither rejected nor refined" and "accepted . . . tacitly" by the Michigan Supreme Court. (5a). The Court of Appeals then held that "Harless' reliance on *Martin* was sufficient to present the state courts with the substance of his due process challenge to the malice instruction" (5-6a). This holding in a published decision totally eviscerates the doctrine of exhaustion in the Sixth Circuit. Henceforth, no claim for relief need be based on the constitution, even in elementary terms. It will suffice that a habeas petitioner has relied in the state courts on precedent wherein a vague federal constitutional claim was resolved on the basis of state law.

No constitutional issue was decided in *People* v *Martin*. Therefore, Respondent's reliance on *Martin* could not have alerted the Michigan courts to the existence of a constitutional issue. The sum and substance of the Michigan Supreme Court's holding in *Martin* regarding malice instructions was:

"The law does not imply malice where a deadly weapon

is used. Michigan has long ago considered malice a permissible inference to be drawn by a jury rather than a presumption of law. Justice Christiancy stated in *Maher* v *People*, 10 Mich 212, 218 (1862):

> "To give the homicide the legal character of murder, all the authorities agree that it must have been perpetrated with malice prepense or aforethought. This malice is just as essential an ingredient of the offense as the act which causes the death; without the concurrence of both, the crime can not exist; and, as every man is presumed innocent of the offense with which he is charged till he is proved to be guilty, this presumption must apply equally to both ingredients of the offense—to the malice as well as to the killing. Hence, though the principle seems to have been sometimes overlooked, the burden of proof, as to each, rests equally upon the prosecution, though the one may admit and require more direct proof than the other; malice, in most cases, not being susceptible of direct proof, but to be established by inferences more or less strong, to be drawn from the facts and circumstances connected with the killing, and which indicate the disposition or state of mind with which it was done. It is for the court to define the legal import of the term, malice aforethought, or, in other words, that state or disposition of mind which constitutes it; but the question whether it existed or not, *in the particular instance*, would, upon principle, seem to be as clearly a question of fact for the jury, as any other fact in the cause, and that they must give such weight to the various facts and circumstances accompanying the act, or in any way bearing upon the question, as in their judgment, they deserve: and that the court have (sic) no right to withdraw the question from the jury by assuming to draw the proper inferences from the whole, or any part, of the facts proved, as

> presumption of law. If courts could do this, juries might be required to find the fact of malice where they were satisfied from the whole evidence it did not exist.' (Emphasis by Court.)
>
> "This continues to be the law in Michigan today. See, also, *People* v *Bourne*, 385 Mich 170; 188 NW2d 573 (1971)."

392 Mich at 561-562; 221 NW2d at 340-341.

The constitutional claim in *Martin* did not relate to the malice instruction; rather, it related to the trial court's refusal to clarify a juror's inquiry. 392 Mich at 558; 221 NW2d at 338-339. The *Martin* language quoted by the Court of Appeals, to wit:

> "An erroneous or misleading charge denies Defendant the right to have a properly instructed jury pass upon the evidence."

was supported in *Martin* only by state precedent and was unrelated to the malice instruction. This language related to the separate issue of the judge's refusal in *Martin* to respond to the juror's repeated questions. 392 Mich at 562; 221 NW2d at 341. Thus, *Martin* cannot be fairly read as resolving any constitutional claim, let alone one relating to the malice instruction. However, in the Sixth Circuit's determination, all that is now necessary to meet the exhaustion requirements of 28 USC § 2254(b) and (c) is to rely on state precedent on an unrelated issue to the effect that a defendant has a "right to have a properly instructed jury pass upon the evidence." Apparently by coincidence, the Court of Appeals decisional date in this case is the same as *Rose* v *Lundy*, ... US ...., 50 LW 4272, 4275 (1982), where this Court reemphasized that "[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law" and

thus give those courts "the first opportunity to review all claims of constitutional error."

In *Picard* v *Connor, supra,* the habeas petitioner challenged his indictment in the state courts on the basis that the procedure to amend the indictment had not complied with the Massachusetts fictitious name statute. The Court of Appeals for the First Circuit held that the issue raised in the state courts was sufficient to exhaust the related federal constitutional issue of whether the amending procedure violated the equal protection guarantees of US Const, Am XIV. This Court reversed, holding that there had been no exhaustion because the habeas applicant had not attacked his indictment in the state courts on the same constitutional grounds, even though all the facts on which the constitutional claim were based had been presented to the state court:

> "The claim that an indictment is invalid is not the substantial equivalent of a claim that it results in an unconstitutional discrimination."
>
> 404 US at 278.

In Respondent's case, the failure to exhaust state remedies is even more glaring than in *Picard.* There, the petitioner had at least attacked his indictment in state court on one Fourteenth Amendment ground, contending that the Fifth Amendment requirement of grand jury indictment was applicable to the states. Here, Respondent did not rely upon any constitutional principle. He claimed in the state courts that a jury instruction prevented a factual determination of malice and, consequently, a verdict of manslaughter. *People* v *Harless, supra,* 78 Mich App at 749; 261 NW2d at 43. As Respondent wound his way through the federal courts, the claim evolved. The jury instruction was now said to have created a conclusive presumption on an essential element of first degree murder, thereby so infecting the entire trial as to deny due process

of law. The issue as framed in the state courts is not the substantial equivalent of the federal issue, either in legal basis or claim of prejudice.

In *Pitchess* v *Davis*, 421 US 482 (1975), the habeas applicant contended that he had exhausted his claim relating to the destruction of physical evidence by applying in the California appellate courts for a writ of prohibition. This Court held that "exhaustion of state remedies is required as a prerequisite to consideration of each claim sought to be presented in federal habeas," 421 US at 487, and that "denial by state appellate courts of respondent's applications cannot be fairly taken to be an adjudication of the merits of his claim and full post-trial appellate review is available if Respondent is convicted." 421 US at 488. As will be discussed, *infra*, full post-trial appellate review is still available to Respondent in Michigan on his unexhausted claim of unconstitutional jury instruction.

In *Mabry* v *Klimas*, 448 US 444 (1980), the habeas applicant contended that his sentence had been unconstitutionally altered by the Supreme Court of Arkansas. Although it was the action of the state's highest court which was the basis for the claim, this Court observed that the habeas applicant's precise claim had apparently never been presented to the state courts. This Court held that "in the absence of any reason to believe that state judicial remedies would now be unavailable, a federal court is required to stay its hand" to give the state the initial opportunity to pass upon and correct alleged violations of federal rights. 448 US at 447.

There is no reason to believe that state judicial remedies on the unexhausted claim would now be unavailable to Respondent Harless. He conceded in his brief in the Sixth Circuit that he may, without time limit, raise his constitutional claim in the state trial court by delayed motion for

new trial or, without time limit, may present his claim directly to the Michigan Court of Appeals by application for delayed appeal. Furthermore, the Michigan court has declared that a showing adequate to warrant the grant of an application for delayed appeal is made whenever the error shown amounts to a deprivation of due process of law. *People* v *Berry*, 10 Mich App 469, 474-475; 157 NW2d 310, 313 (1968). Furthermore, when fairly presented with the issue, the Michigan courts have been sensitive to Respondent's constitutional claim. Following this Court's decision in *Sandstrom* v *Montana*, 442 US 510 (1979), the Michigan Supreme Court in *People* v *Wright*, 408 Mich 1; 289 NW2d 1 (1980) held that certain widely used Michigan jury instructions were no longer constitutionally permissible and that the determination of whether reversal is required in past cases is to be guided by the federal constitutional harmless error standard. Under these circumstances, Respondent should be required to make a fair presentation of his constitutional claim to the state courts.

II.

THE QUESTION OF WHAT CONSTITUTES EXHAUSTION UNDER 28 USC § 2254(b) and (c) IS AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHICH THE COURTS OF APPEALS ARE IN CONFLICT AND WHICH SHOULD BE DECIDED BY THIS COURT.

The Court of Appeals' decision on this case is squarely in conflict with the law in other circuits. In *Johnson* v *Metz*, 609 F2d 1052 (CA 2, 1979) it was held that defendants' contention in state court that the trial judge's intervention in the proceedings had deprived them of a fair a trial as a matter of state law, which defendants supported by citing a number of state court decisions dealing with the supervisory power of state courts, did not exhaust their claim, later asserted in

a federal habeas corpus proceeding, that the trial court's actions had deprived them of due process as a matter of federal constitutional law.

In *Gayle* v *LeFevre*, 613 F2d 21 (CA 2, 1980), the habeas applicant had presented to the state appellate court his claim that the conduct of the trial judge had deprived him of a fair trial and his claim that his post-arrest statements should have been suppressed. The Court of Appeals determined, however, that the related federal constitutional claims, as such, had not been raised in the state appellate court, and that such claims were expressly raised for the first time only in the federal habeas corpus petition. Under these circumstances, the court held that the habeas corpus applicant had failed to exhaust his state court remedies.

In *Sabino* v *LeFevre*, 630 F2d 919 (CA 2, 1980), it was held that the state prisoner's claim that his due process rights had been violated by remarks of the state trial judge which precluded the prisoner from taking the witness stand in his own defense had not been exhausted because the issue had not been raised in state court in constitutional terms.

In *Wright* v *Bombard*, 638 F2d 457, 459 (CA 2, 1980), *cert den* 405 US 935, it was held that a state prisoner's constitutional claim had not been exhausted, the Court of Appeals noting, *inter alia*, that

> "[t]here was no mention of the Constitution or the Due Process Clause, nor citation of any authorities which would have supported or been relevant to the constitutional claim."

In *Paullet* v *Howard*, 634 F2d 117, 119-120 (CA 3, 1980), it was held that a habeas petitioner's due process claims with regard to the state prosecutor's opening remarks and the trial

court's refusal to allow comment on the prosecution's failure to present medical evidence had not been exhausted, where the claims were presented in state court as reversible trial error, not as constitutional violations.

In *Minafee* v *Estelle*, 491 F2d 1096 (CA 5, 1974), the court cited *Picard* v *Connor* in holding that state court remedies had not been exhausted even though the same factual basis asserted in the application for federal habeas corpus had been asserted in the state prisoner's direct appeal in the state court. The holding in *Minafee* is to be contrasted with the result reached in the instant case, where, in support of its holding, the Sixth Circuit thought it important to observe that the state "concedes that Harless presented to the state appellate courts all the facts on which he based his federal constitutional claim." (4a).

In *Wilks* v *Israel*, 627 F2d 32, 37-38 (CA 7, 1980), *cert den* 449 US 1086, it was held that a prisoner who argued in state court that the trial court abused its discretion in rejecting his plea of guilty to a lesser charge had not exhausted his claim asserted in federal habeas corpus that the rejection of the plea deprived him of due process.

In *Thomas* v *Wyrick*, 622 F2d 411 (CA 8, 1980), the Missouri prisoner had claimed on direct appeal in the state courts that failure to allow him to call a character witness was an abuse of discretion and "denied a fair trial," without citing any provision of the federal constitution or any federal case. Although the state courts had been presented with all the facts on which the related federal constitutional claim was based, this presentation was held insufficient to satisfy the exhaustion requirements of § 2254.

In *Conner* v *Auger*, 595 F2d 407, 413 (CA 8, 1979), *cert den* 444 US 851, the Court of Appeals declined to consider the

merits of a federal habeas corpus claim that certain jury instructions conclusively imputed malice of a codefendant to the petitioner in violation of the Fourteenth Amendment. The Court observed that although the petitioner had contested the propriety of the pertinent jury instructions in his state court appeal, there was no discussion in his state court appellate brief or the state appellate court's opinion of the constitutional basis for the claim.

During the past decade, in the interests of comity and federalism, the clear trend of this Court's decisions has been to mandate strict compliance with the exhaustion requirements set forth in 28 USC § 2254(b) and (c). *Picard* v *Connor, supra. Pitchess* v *Davis, supra. Mabry* v *Klimas, supra. Rose* v *Lundy, supra.* The decisions from the Second, Third, Fifth, Seventh and Eighth circuits set forth above are in conformity with this Court's holdings. The decision of the Court of Appeals for the Sixth Circuit in this case is not.

III.

THE NECESSITY OF RECONCILING SANDSTROM v MONTANA, 442 US 510 (1979) WITH CUPP v NAUGHTEN, 414 US 141 (1973) AND CHAPMAN v CALIFORNIA, 386 US 18 (1967) PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

To justify its grant of habeas relief, the Court of Appeals isolated one phrase from a single sentence in a jury instruction comprising some 20 pages of trial transcript. Neither party objected to the instructions at trial. No incompetence or ineffective assistance of counsel was alleged. In spite of these facts, and after paying lip service in its second opinion to this Court's decision in *Cupp* v *Naughten*, the Court of

Appeals did precisely what is forbidden by that decision. It viewed a single challenged phrase in "artificial isolation" rather than in the context of the overall charge. *Cupp* v *Naughten, supra,* 414 US at 146-147.

The alleged offending phrase reads:

> *". . . but you must imply malice if you find death was implied by the use of a gun against another."*

Because the instruction as transcribed does not make sense, it represents either a slip of the tongue by the trial judge or an error in transcription. In contrast to this one garbled phrase, the jury was instructed in unmistakable terms:

> "Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion. . . ." (59a).

Furthermore, the use of a weapon by Respondent was a fact that was conceded by him in his testimony. He admitted the shootings, claiming that they were done in defense of his son. The jury was instructed thoroughly and correctly on this defense.

> "A defense of self-defense having been raised, the Prosecutor is duty bound to prove to you, beyond a reasonable doubt, that it was not self-defense." (61-62a)

While correctly observing that Respondent cannot be guilty if he acted in self-defense (8a), the Sixth Circuit ignored that the jury was fully instructed as to this fact.

The jury was also instructed at length that adequate provocation could eliminate the element of malice:

"Sometimes when there is a killing done suddenly, without premeditation as in Second Degree Murder, but done also as a result of great excitement, great provocation, the crime is reduced from Second Degree Murder to Manslaughter. The law contemplates in such circumstance the provocation may be such as to eliminate the element of malice from being a moving cause which caused the Homicide.

"The difference between Second Degree Murder and Manslaughter has to do with the absence or presence, as the case may be, of the evidence of malice.

"If you find in this case there was a killing, done during a moment of extreme excitement, extreme provocation, then you may find though such killing was intentional, under the definition, nevertheless, the act is not murder but is manslaughter. It is not ever (sic) provocation that will give rise to circumstances as will reduce the crime of Second Degree Murder to that of Manslaughter. It must be such, the provocation must be such as would cause men of reasonable and average disposition to act rationally (sic) from passion rather than out of mature judgment. You must take whatever act you may see in the evidence here and determine whether or not that act as perceived by the Defendant at the time was such as would provoke the reasonable human being to act in such a way as he may take a life acting from the passion rather than mature ordinary judgment.

"In this case, if you find such an act done as a result of provocation, where the average reasonable person would have acted in the manner you find the Defendant acted; if you, under the proofs, find the Defendant did indeed take the lives in this case, then you may find him guilty of Manslaughter." (60-61a).

Having been so instructed, it is inconceivable that the jurors could have believed that they must presume malice and therefore find Respondent guilty at least of second degree murder as a result of Respondent's use of a gun.

In *Sandstrom, supra,* 442 US at 527, this Court remanded for further proceedings including the possibility of harmless error analysis under *Chapman* v *California,* 386 US 18 (1967). In this proceeding, any constitutional error in the isolated phrase which is challenged must be deemed harmless beyond a reasonable doubt since it was clearly overcome by the other correct instructions.

In determining whether one garbled phrase from the jury instructions should be held fatal to these convictions, it should be noted that the jury did not merely find Respondent Harless guilty of second degree murder. It found him guilty of first degree—deliberate and premeditated—murder. As was the case in *United States* v *Frady,* .... US ...., 50 LW 4388, 4393 (1982), an examination of the jury instructions "shows no substantial likelihood that the same jury that found [Harless] guilty of first-degree murder would have concluded, if only the malice instructions had been better framed, that his crime was only manslaughter." The instructions on the element of premeditation are set forth at 59-60a. Respondent has never challenged the instructions as they related to that element. Since the jury found that Respondent premeditated killing his victims, and rejected his claims of self-defense and provocation, any error in the malice instruction was harmless.

Given the context of the complete trial, the principal issues of self-defense and provocation, no reasonable juror could have believed that a finding of malice must follow from a fact conceded by Respondent. Certainly, defense counsel would have objected strenuously if he had even the slightest suspicion that this is what the jury understood. Respondent's

case is therefore clearly distinguishable from *Sandstrom* where defense counsel vigorously objected to the offending instruction because it had the potential of eviscerating his client's defense. 442 US at 513. In Respondent's case, there was no such possibility and there was, therefore, no objection. The alleged offending instruction could simply not have "by itself so infected the entire trial that the resulting conviction violates due process." *Cupp* v *Naughten*, 414 US at 147.

Here, the courts below "construed their power to issue writs of habeas corpus as though it were tantamount to the authority of an appellate court considering a direct appeal from a trial court judgment." *Rose* v *Lundy*, *supra*, Stevens J., dissenting, ... US at ..., 50 LW at 4282. The instruction was merely a convenient peg on which the federal courts could hang a "reversal" of a state court jury verdict which they considered unnecessarily harsh.

Certiorari should be granted in this case to clarify the relationship between *Cupp* v *Naughten* and *Sandstrom* v *Montana* and *Chapman* v *California*.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Stephen F. Schuesler
Assistant Attorney General
774 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-8060

Date: May 3, 1982

Appendix

TABLE OF CONTENTS

Page

1. *Harless* v *Anderson*, unreported order granting stay of mandate pending application for certiorari, CA 6, No 81-1145 (April 1, 1982) 1a

2. *Harless* v *Anderson*, unreported order on rehearing substituting new opinion, CA 6, No 81-1145 (March 3, 1982). 2a

3. *Harless* v *Anderson*, ... F2d .... (CA 6, March 3, 1982), Slip Opinion 3a

4. *Harless* v *Anderson*, ... F2d .... (CA 6, November 24, 1981), Slip Opinion 9a

5. *Harless* v *Anderson*, unreported order granting release on bond pending appeal, ED Mi 80-70905 (July 6, 1981) 14a

6. *Harless* v *Anderson*, unreported order granting stay of judgment pending appeal, ED Mi 80-70905 (February 24, 1981) 16a

7. *Harless* v *Anderson*, 504 F Supp 1135 (January 8, 1981), Slip Opinion 17a

8. *Harless* v *Anderson*, ED Mi 80-70905, Docket Entries 25a

9. *People* v *Harless*, unreported opinion and order denying motion for new trial, Detroit Recorder's Court 74-05346 (September 24, 1979) 28a

10. *People* v *Harless*, unreported order denying leave to appeal or other relief, Mich S Ct 61101 (June 21, 1979) 30a

11. *People* v *Harless*, 78 Mich App 745; 261 NW2d 41 (October 10, 1977) 32a

12. *People* v *Harless*, from state court appellate pleadings Harless's Motion for rehearing, filed October 21, 1977 in the Michigan Court of Appeals 39a

Page

Harless's Brief, filed August 30, 1976 in the Michigan Court of Appeals, excerpts 43a

Memorandum in support of Harless's Application for Remand, filed April 13, 1976 in the Michigan Court of Appeals, excerpts 50a

13. Jury Instructions, Trial Transcript Vol 6, pp 82-102 54a

14. Verdict, Trial Transcript Vol 6, pp 103-105 ..... 67a

No. 81-1145

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JACK E. HARLESS, Petitioner-Appellee, vs CHARLES E. ANDERSON, Respondent-Appellant.	

ORDER

Upon consideration of the appellant's motion to stay the mandate pending application for writ of certiorari; And

Further considering the appellee's response in support, thereto,

It is ORDERED that the motion be and it hereby is granted.

ENTERED BY ORDER
OF THE COURT.

John P. Hehman, Clerk
Leonard Green /s/
Leonard Green, Chief Deputy Clerk

No. 81-1145
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACK E. HARLESS, Petitioner-Appellee, vs CHARLES E. ANDERSON, Respondent-Appellant.	

ORDER

Before: MERRITT and MARTIN, Circuit Judges; and PECK, Senior Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel, feeling that the motion to reconsider is in part well founded, does hereby withdraw its earlier opinion and substitutes in its stead the following opinion.

ENTERED BY ORDER
OF THE COURT.

John P. Hehman /s/
John P. Hehman, Clerk

No. 81-1145

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Jack E. Harless Petitioner-Appellee, v. Charles E. Anderson, Respondent-Appellant.	On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 3, 1982.

Before: Merritt and Martin, Circuit Judges; and Peck, Senior Circuit Judge.

Martin, Circuit Judge. Respondent Anderson, Warden of the Southern Michigan State Prison, appeals an order conditionally granting habeas relief to petitioner Harless, unless the State should retry him within ninety days. On June 12, 1975, Harless was convicted by a Detroit Recorder's Court jury of two counts of first degree murder. Harless received a mandatory life sentence with no possibility of parole. Harless then appealed to the Michigan Court of Appeals, which affirmed his conviction in *People* v. *Harless*, 78 Mich. App. 745 (1977). On June 21, 1979, the Michigan Supreme Court reviewed the Court of Appeals record and denied Harless' request for relief.

Harless petitioned the District Court on February 29, 1980, for a writ of habeas corpus, alleging that a jury instruction on malice denied him due process by creating a conclusive presumption on an issue that the State must prove. On January 8, 1981, the District Court granted a conditional writ, con-

[2]

cluding that Harless had exhausted available state remedies,

and that the malice instruction denied Harless due process. Harless is currently out on bond.

Respondent now appeals, contending that the District Court erred by: 1) finding that Harless exhausted available state remedies; and 2) concluding that the malice instruction was an improper conclusive presumption. We reject both of respondent's contentions and therefore affirm the District Court's judgment.

In our view, Harless adequately exhausted available state remedies for purposes of 28 U.S.C. §§ 2254(b) and (c). The respondent concedes that Harless presented to the state appellate courts all the facts on which he based his federal constitutional claim. Respondent contends, however, that the state courts had no opportunity to correct the constitutional error, because Harless did not explicitly complain to the state courts that the malice instruction denied him due process.

Although we do not have before us Harless' state appellate papers, we learn from the Michigan Court of Appeals opinion the substance of Harless' contention before that court: "The trial court committed *reversible error* by instructing the jury *incorrectly* on the implication [sic] of malice that might be drawn from defendant's use of a deadly weapon, *the effect of which was to remove the possible finding of manslaughter.*" *People* v. *Harless*, 261 N.W.2d 41, 43 (1977) (emphasis added). At Harless' trial the court gave the following definition of malice to the jury:

> Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion, *but you must imply malice if you find death was implied [sic] by the use of a gun against another.* (emphasis added).

Harless claimed on appeal that this instruction was reversible error under *People* v. *Martin*, 392 Mich. 553 (1974),

[3]

a case holding that the law does not imply malice from the use of a deadly weapon. In *Martin*, appellant challenged his murder conviction on numerous state and constitutional grounds. The gist of Martin's appeal was that he was denied a fair trial because certain instructions failed to provide the jury with sufficient understanding of the elements of the crimes charged, to enable them to perceive the crucial distinctions between first and second degree murder, and manslaughter. In particular, Martin challenged a malice instruction in which the jury was informed that the law implies malice from the use of a deadly weapon. The Court of Appeals ultimately decided as a matter of state law that the malice instruction "erroneously categorized [the issue of malice] as a presumption of law rather than a permissible inference." 221 N.W.2d at 341. However, Martin's constitutional argument was broadly phrased: failure to explain the law properly to a jury through adequate instructions abridges the due process right to a fair trial. The Court of Appeals neither rejected not refined this constitutional argument. Rather, it seems to have accepted it tacitly, for in response to defendant's argument that his Sixth and Fourteenth Amendment rights to a fair trial had been abridged by an inadequate manslaughter instruction, the court stated that "an erroneous or misleading charge denies the defendant the right to have a properly instructed jury pass upon the evidence." *Id.* at 341. Although in did not specifically label this a federal right, the court clearly felt that a properly instructed jury is a prerequisite to a fair trial.

In our view, Harless' reliance on *Martin* was sufficient to present the state courts with the substance of his due process

challenge to the malice instruction for habeas exhaustion purposes. The substance of Harless' state appeal, although unartfully phrased, sufficiently asked the state court to consider that the incorrect malice instruction denied Harless a fair jury trial by effectively eliminating the possibility of a

[4]

manslaughter verdict from the jury's consideration. In our view, the due process ramifications were self-evident. Under *Picard* v. *Connor*, 404 U.S. 270 (1971), a habeas petitioner need not lable his state claim as federal or constitutional. Given the elasticity of the due process concept, we are convinced that the Michigan courts had a fair opportunity to consider the issue encompassed by Harless' habeas corpus petition.

We now turn to the substantive issue raised by the jury instruction. Although the state has argued that the instruction appears as it does in the official transcript because of an error in transcription, it has offered no support for that claim. We cannot, on the basis of this allegation alone, assume that the instruction actually given differed from the instruction contained in the record. On the basis of the record, we agree with the District Court that it denied Harless due process by requiring the jury to find malice from the use of a weapon. Harless relied on self-defense, contending that he lacked the requisite intent or malice to justify a murden conviction. A killing without malice can be no more than manslaughter, and the state must prove malice beyond a reasonable doubt. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). The trial court gave the jury a self-contradictory, garbled instruction on malice: "You are not obligated to reach the conclusion, but you must imply malice if you find death was implied [sic] by the use of a gun against another." The operative effect of the underlined language was to require the jury to find

malice if death was caused by the use of a gun. Here we can only assume that the jury followed the erroneous instruction:

> [E]ven if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do. As the jury's verdict was a general one . . . we have no way
>
> [5]
>
> of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction.

Sandstrom v. *Montana, supra* at 526 (emphasis in original).

We emphasize that this opinion does not, in any way, expand the scope of habeas review. It must not be read as an indication that the courts of this circuit will grant habeas relief to every state defendant convicted on erroneous jury instructions. On the contrary, we adhere to the fundamental principle of *Cupp* v. *Naughton*, 414 U.S. 141, 146 (1973):

> Before a federal court may overturn a conviction resulting from a state trial . . . it must be established not merely that the [state's action] is undesirable, erroneous, or even "universally condemned," but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.

The Supreme Court has recently reaffirmed this principle in *Sumner* v. *Mata*, 449 U.S. 539 (1981) and *Smith* v. *Phillips*, —— U.S. ——, 50 U.S.L.W. 4190 (decided January 25, 1982).

In the present case, we hold only that the jury instructions discussed above were so garbled and confusing that they

violated the defendant's constitutionally guaranteed right to due process of law. It is axiomatic that due process requires the state to prove beyond a reasonable doubt every element of a criminal offense. *Patterson* v. *New York*, 432 U.S. 197 (1977); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). Malice is one such element of the crime of murder. If, as Harless argued, he acted in self-defense, he cannot be guilty of murder. As Chief Judge Edwards observed in *Berrier* v. *Egeler*, 583 F.2d 515 (1978), it is up to the state of Michigan to show beyond a reasonable doubt that a defendant accused of murder did *not* act in self-defense. A showing of malice is one essential aspect of this burden of proof.

When we view the jury instructions in this case as a whole, as *Cupp* v. *Naughton*, *supra*, requires us to do, we can only

[6]

conclude that they relieved the state of its burden of proving malice beyond a reasonable doubt. This was constitutional error.

The judgment of the District Court is affirmed.

No. 81-1145

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Jack E. Harless, Petitioner-Appellee, v. Charles E. Anderson, Respondent-Appellant.	On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed November 24, 1981.

Before: Merritt and Martin, Circuit Judges; and Peck, Senior Circuit Judge.

Martin, Circuit Judge. Respondent Anderson, Warden of the Southern Michigan State Prison, appeals an order conditionally granting habeas relief to petitioner Harless, unless the State should retry him within ninety days. On June 12, 1975, Harless was convicted by a Detroit Recorder's Court jury of two counts of first degree murder. Harless received a mandatory life sentence with no possibility of parole. Harless then appealed to the Michigan Court of Appeals, which affirmed his conviction in *People* v. *Harless*, 78 Mich. App. 745, 261 N.W.2d 41 (1977). On June 21, 1979, the Michigan Supreme Court reviewed the Court of Appeals record and denied Harless' request for relief.

Harless petitioned the District Court on February 29, 1980, for a writ of habeas corpus, alleging that a jury instruction on malice denied him due process by creating a conclusive pre-

[2]

sumption on an issue that the State must prove. On January

8, 1981, the District Court granted a conditional writ, concluding that Harless had exhausted available state remedies, and that the malice instruction denied Harless due process. Harless is currently out on bond.

Respondent now appeals, contending that the District Court erred by: 1) finding that Harless exhausted available state remedies; and 2) concluding that the malice instruction was an improper conclusive presumption. We reject both of respondent's contentions and therefore affirm the District Court's judgment.

In our view, Harless adequately exhausted available state remedies for purposes of 28 U.S.C. §§ 2254(b) and (c). The respondent concedes that Harless presented to the state appellate courts all the facts on which he based his federal constitutional claim. Respondent contends, however, that the state courts had no opportunity to correct the constitutional error, because Harless did not explicitly complain to the state courts that the malice instruction denied him due process.

Although we do not have before us Harless' state appellate papers, we learn from the Michigan Court of Appeals opinion the substance of Harless' contention before that court: "The trial court committed *reversible error* by instructing the jury *incorrectly* on the implication [sic] of malice that might be drawn from defendant's use of a deadly weapon, *the effect of which was to remove the possible finding of manslaughter.*" *People* v. *Harless*, 261 N.W.2d 41, 43 (1977) (emphasis added). At Harless' trial the court gave the following definition of malice to the jury:

> Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion, *but you must imply malice if you find death*

was implied [sic] by the use of a gun against another. (emphasis added).

[3]

Harless claimed on appeal that this instruction was reversible error under *People* v. *Martin*, 392 Mich. 553, 221 N.W.2d 336 (1974), a case holding that the law does not imply malice from the use of a deadly weapon. In *Martin*, appellant challenged his murder conviction on numerous state and constitutional grounds. The gist of Martin's appeal was that he was denied a fair trial because certain instructions failed to provide the jury with sufficient understanding of the elements of the crimes charged, to enable them to perceive the crucial distinctions between first and second degree murder, and manslaughter. In particular, Martin challenged a malice instruction through which the jury was informed that the law implies malice from the use of a deadly weapon. The Court of appeals ultimately decided as a matter of state law that the malice instruction "erroneously categorized [the issue of malice] as a presumption of law rather than a permissible inference." 221 N.W.2d at 341. However, Martin's constitutional argument was broadly phrased: failure to explain the law properly to a jury through adequate instructions abridges the due process right to a fair trial. The Court of Appeals neither rejected nor refined this constitutional argument. Rather, it seems to have accepted it tacitly, for in response to defendant's argument that his Sixth and Fourteenth Amendment rights to a fair trial had been abridged by an inadequate manslaughter instruction, the court stated that "an erroneous or misleading charge denies the defendant the right to have a properly instructed jury pass upon the evidence." *Id.* Although it did not specifically label this a *federal* right, the court clearly felt that a properly instructed jury is a prerequisite to a fair trial, which *is* a federal right guaranteed by the due process clause.

In our view, Harless' reliance on *Martin* was sufficient to present the state courts with the substance of his due process challenge to the malice instruction, for habeas exhaustion purposes. The substance of Harless' state appeal, although in-

[4]

artful'y phrased, sufficiently asked the state court to consider that the incorrect malice instruction denied Harless a fair jury trial by effectively eliminating the possibility of a manslaughter verdict from the jury's consideration. In our view, the due process ramifications were self-evident. Under *Picard* v. *Connor*, 404 U.S. 270 (1971), a habeas petitioner need not label his state claim as federal or constitutional. Given the elasticity of the due process concept, we are convinced that the Michigan courts had a fair opportunity to consider the issue encompassed by Harless' habeas corpus petition.

Next, assuming the malice instruction was given to the jury as it appears in the transcript, we agree with the District Court that it denied Harless due process by requiring the jury to find malice from the use of a weapon. Harless relied on self-defense, contending that he lacked the requisite intent or malice to justify a murder conviction. A killing without malice can be no more than manslaughter, and the state must prove malice beyond a reasonable doubt. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). The trial court gave the jury a self-contradictory garbled instruction on malice: "You are not obligated to reach the conclusion, *but you must imply malice if you find death was implied* [sic] *by the use of a gun against another.*" The operative effect of the italicized language was to require the jury to find malice if death was caused by the use of a gun. Here we can only assume that the jury followed the erroneous instruction:

> [E]ven if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we

> cannot be certain that this is what they *did* do. As the jury's verdict was a general one . . . we have no way of knowing that [the defendant] was not convicted on the basis of the unconstitutional instruction.

Sandstrom v. *Montana*, *supra* at 526 (emphasis in original).

Accordingly, we affirm the judgment of the District Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACK E. HARLESS, Petitioner, -v- CHARLES E. ANDERSON, Respondent.	Hon. Horace Gilmore Civil No. 80-70905

ORDER GRANTING MOTION FOR ADMISSION TO BAIL

At a session of said Court held this 6th day of July, 1981, at the Federal Courthouse, Detroit, Michigan.

Present: The Hon. Horace W. Gilmore, United States District Judge.

This matter having come before this Court on Petitioner's Motion for admission to bail pursuant to F.R.A.P. 23(c), and the Court being fully advised in the premises, and for the reasons set forth by the Court at said hearing;

It is ordered that the motion for admission to bail be, and the same hereby is, GRANTED. It is further ordered that Petitioner is to be released on $10,000 unsecured bond pending appeal in the 6th Circuit subject to the following conditions:

1) Petitioner is to report each week to the United States Pre-Trial Services in the United States Court House, Detroit, Michigan,

2) Petitioner is to maintain a residence approved by the United States Pre-Trial Service.

3) Petitioner is restricted from traveling beyond the area of the Eastern District of Michigan,

4) Petitioner is to seek regular employment, and

5) If this Court's prior granting of a writ of habeas corpus to Petitioner Harless is reversed by the Sixth Circuit Court of Appeals, Petitioner is to surrender to the U.S. Marshal within 48 hours of issuance of such mandate.

Wherefore, a writ of habeas corpus ordering the release of Petitioner from State custody shall issue.

HORACE W. GILMORE
United States District Judge

Dated: July 2, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACK E. HARLESS, Petitioner, v. CHARLES E. ANDERSON, Respondent.	CIVIL ACTION No. 80-70905

ORDER

IT IS ORDERED that the Respondent's application for stay pending appeal of the judgment of January 8, 1981 ordering the release of Petitioner Harless from State custody be, and the same hereby is GRANTED.

Horace W. Gilmore /s/
HORACE W. GILMORE
United States District Judge

DATED: Feb. 24, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JACK E. HARLESS, Petitioner, v. CHARLES E. ANDERSON, Respondent.	CIVIL ACTION No. 80-70905

OPINION

Petitioner, Jack E. Harless, a prisoner at the State Prison of Southern Michigan, brings this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On June 9, 1975, Petitioner was convicted by a Detroit Recorder's Court jury of two counts of first degree murder and was sentenced to life imprisonment. His conviction was affirmed by the Michigan Court of Appeals on October 19, 1977, *People* v. *Harless*, 78 Mich. App. 745 (1977). A letter request for appeal to the Michigan Supreme Court, pursuant to Administrative Order 1977-4,400 Mich. lxvii, was denied on June 21, 1979.

The issues presented in the instant petition are:

1. That the trial court improperly instructed the jury.

2. That justice did not prevail at the trial;

3. That there was insufficient evidence for the jury to find guilt beyond a reasonable doubt;

4. That the trial court failed to instruct the jury in an intelligent manner;

5. That the trial court erred in the admission of certain photographs.

The Respondent has filed a Motion to Dismiss or, in the alternative, a Motion for Summary Judgment.

As the first ground for relief, Petitioner alleges that the jury instructions concerning malice were in error in that they directed the jury to imply malice from the use of a weapon. The instruction stated:

> "Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion, *but you must imply malice if you find death was implied by the use of a gun against another.* The doing of a cruel act without excuse or justification." (Transcript, Vol. VI, at 91) (emphasis added)

In considering this issue, the Michigan Court of Appeals said, (78 Mich. App. at 748-750, (1979)):

> "We do not believe in this case that the instruction given to the jury prevented their factual determination of whether malice existed or, consequently, whether manslaughter was a proper verdict. . . . They were not ordered to find malice simply because a deadly weapon was used.
>
> ". . . By leaving to the jury the freedom to determine from the facts that malice would not necessarily be implied from the use of a deadly weapon, the trial court did not remove possible consideration of a manslaughter verdict from the jury. . . ."

The Court therefore concluded that the instructions did not

create a conclusive presumption of malice.

Petitioner's claim demands a precise differentiation between presumptions and inferences and an analysis of the effect of each on the prosecutor's burden of proving every element of the crime charged. *See* McCormick, *The Law of Evidence* 342-46 (2d Ed. 1972); 8 Wigmore, *Evidence* 2490-540 (3rd Ed. 1940); Ashford & Risinger, *Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165 (1969); Bohlen, *The Effect of Rebuttable Presumptions of Law;* and Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. (1979).

Inferences and presumptions are used to assist in ascertaining the presence of an element of a crime from the existence of one or more "evidentiary" or "basic" facts. The most common of these evidentiary devices is the permissive inference or permissive presumption. A permissive presumption allows the trier of fact to accept or reject the presumption, and does not shift the burden of proof. *County Court of Ulster County* v. *Allen*, 442 U.S. 140 (1979).

A mandatory presumption requires a finding as to the existence of the ultimate fact upon proof of the basic fact, unless the trier of fact is otherwise persuaded by evidence rebutting the presumed connection between two facts. *See Turner* v. *United States*, 396 U.S. 398, 402-405 (1970); *Morrisette v. United States*, 342 U.S. 246, 274-75 (1952). Such a mandatory presumption conflicts with the presumption of innocence and unconstitutionally shifts the burden of proof to the defendant. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *County Court of Ulster County* v. *Allen*, (supra)

The hallmarks of our system of criminal justice are the accused's right to a trial by jury, and the presumption of innocence until proven guilty. Both the right to trial by jury and

the presumption of innocence have been repeatedly protected from erosion by operation of mandatory presumptions. In *Bollenbach* v. *United States*, 326 U.S. 607 (1946), the accused was convicted of conspiracy to transport stolen securities in interstate commerce. The trial judge gave the following instruction to the jury:

> ". . . I further charge you that possession of stolen property in another state than that in which it was stolen shortly after the theft raises a presumption that the possessor was the thief and transported stolen property in interstate commerce, but that such presumption is subject to explanation and must be considered with all the testimony in the case." (*Id.* at 609)

In reversing *Bollenbach's* conviction, the Court stated (pages 612, 613):

> "The jury's questions, and particularly the last written inquiry in reply to which the untenable 'presumption' was given, clearly indicated that the jurors were confused concerning the relation of knowingly disposing of stolen securities after their interstate journey had ended to the charge of conspiring to transport such securities. Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria . . . A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

Sandstrom, supra, cites *Bollenbach* with approval, and further elaborates on the relationship between mandatory presumptions and the constitutional right to trial by jury and the "beyond a reasonable doubt" standard:

> "As in *Morissette* and *United States Gypsum Co.*, a conclusive presumption in this case would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime', and would 'invade [the] fact-finding function' which in a criminal case the law assigns solely to the jury. The instruction announced to David Sandstrom's jury may well have had exactly these consequences. Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged.' 397 U.S., at 364, and defendant was deprived of his constitutional rights as explicated in *Winship*." *Id.* at 523.

In the case at bar, the instruction given could be interpreted as creating either a permissive inference or a mandatory presumption. The judge said: "You are not obligated to reach the conclusion," indicating merely a permissible inference, but followed this statement with the words, "you must imply malice if you find death was implied by the use of a gun against another", indicating a mandatory presumption. A juror could have interpreted the instruction in either manner.

The Supreme Court explained in *Sandstrom* (supra), at page 519, that such an instruction is invalid if a jury could have interpreted it as mandatory:

> "However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the

> other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid."

This Court simply cannot understand how the Michigan Court of Appeals could determine that the jury was given the freedom to determine from the facts that malice would not necessarily be implied from the use of a deadly weapon. At one point the instruction said that, but immediately after that, the instruction said that *malice must be implied* if a gun was used against another.

This Court must therefore conclude that the instruction given could have caused the jury to use an unconstitutional conclusive presumption of malice from the use of a weapon.

The Respondent suggests that review of this issue should be barred by Petitioner's failure to object to the instructions. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). In that case, the Supreme Court required compliance with a state "contemporaneous objection" rule, absent a showing of "cause" and "prejudice" justifying federal habeas corpus review.

The *Wainwright* rule, however is inapplicable to the case at bar. Though Michigan does have a "contemporaneous objection" rule, GCR (1963) 516.2, this rule does not apply if there has been manifest injustice. In fact, the Michigan Supreme Court did not apply the rule in *People* v. *Wright*, 408 Mich. 1,30 n.13 (1980), a case involving burden-shifting jury instructions, noting that the

> ". . . failure to object should not be made a basis for relief in these cases. General instructions of this kind may be part of a judge's customary litany and not the subject of conference discussion with counsel before being given. Unless counsel has become conversant with the judge's

> customary instruction, the instruction may be given before he has an opportunity to object. Once given, the damage may be irremediable because the judge must repeat the instruction to identify it and then caution the jury to disregard it. Many defense lawyers may regard 'cure' by a corrected instruction as no better and perhaps worse than the injury."

If the state itself does not require a contemporaneous objection to preserve the issue on appeal, the federal court will not require such an objection. As the Sixth Circuit stated in *Hockenbury* v. *Sowders*, 620 F. 2d 111, 115 (CA6 1980):

> ". . . the failure to comply with a state's contemporaneous objection requirement cannot be deferred to as a separate and independent procedural ground precluding federal review if the state itself did not preclude direct review on the basis of that requirement."

In addition, in a recent *en banc* opinion, *Issac* v. *Engle*, Docket No. 78-3488 (filed December 12, 1980), a similar case involving unconstitutional jury instructions, the Sixth Circuit concluded that there was "cause" and "prejudice" justifying non-compliance with a state contemporaneous objection rule. Thus, this Court is not precluded from considering the constitutional claim.

Even though the instruction at issue is unconstitutional, this Court must, as required by the Sixth Circuit in *Krzeminski* v. *Perini*, 614 F.2d 121 (CA6 1980), apply the harmless error analysis to determine if the unconstitutional jury instruction calls for a new trial. The *Krzeminski* court analyzed harmless error under the test prescribed by the Supreme Court in *Chapman* v. *California*, 386 U.S. 18 (1967), and *Harrington* v. *California*, 395 U.S. 250 (1969), asking whether the error was "harmless beyond a reasonable doubt."

This Court cannot conclude that the instruction in the instant case had no effect on the jury's deliberations. Reliance on a presumption may well have made the jury's decision easier, particularly where the evidence on the issue of malice was contradictory. It is possible that the jury would have considered the Petitioner's actions to have been sufficiently provoked to negate the existence of malice, and merit a verdict of manslaughter. This possibility precludes a finding that the error was harmless beyond a reasonable doubt.

Defendant also argues that the petitioner has not exhausted his state remedies. The Court does not agree. Petitioner's conviction was reviewed by the Court of Appeals and affirmed, and the Supreme Court of Michigan denied leave. Subsequently the defendant filed a motion for new trial with the trial court, which was denied. Petitioner has done all that is necessary to exhaust state remedies.

The Court need not consider other issues raised in this petition because the unconstitutional instruction requires the issuance of the writ of habeas corpus.

For the reasons given, the application for a writ of habeas corpus is granted, unless Petitioner is retried by the State of Michigan within ninety (90) days of the date of this opinion. An appropriate order will issue.

Horace W. Gilmore /s/
HORACE W. GILMORE
UNITED STATES
DISTRICT JUDGE

DATED: January 8, 1981

PLAINTIFFS

(1) Jack E. Harless

DEFENDANTS

(1) Charles E. Anderson, Warden

CAUSE

PRISONER PETITIONS
Habeas Corpus

ATTORNEYS

In Pro Per
#141845
P. O. Box E
Jackson, Michigan 49204

William Burnham (P23286)
Clinical Advocacy Program
Wayne State Univ. Law School
468 Ferry
Detroit, MI 48202 577-3928

Stephen F. Schusler
Asst. Atty General
525 W. Ottawa
763 Law Bldg., Lansing, MI 48913
(517) 373-1124

1980	
Feb. 29	Order granting petitioner to proceed in Forma Pauperis, filed and entered. DD 2-29-80 P. Komives
Feb. 29	Petition for Writ of Habeas Corpus, Filed. DD 2-29-80
Feb. 29	Order requiring filing of responsive pleadings by April 30/80 with instructions for service. DD 3/3/80. Komives, N.
Mar. 5	Proof of mailing on above order to: Charles E. Anderson, Frank J. Kelley by registered mail and Jack E. Harless by regular mail. DD 3/5/80.
Mar. 7	Return receipt, served on Frank Kelley on 3/6/80. DD 3/10/80.
Mar. 21	Marshals return on summons and complaint RETURNED UNEXECUTED ON MR. RAVER. DD 3/24/80.
Apr. 28	Transcript of recorders court. DD 4/28/80.
Apr. 28	Appellate briefs in the State of Michigan. DD 4/28/80.
Apr. 28	Notice of filing transcript and appellate briefs. DD 4/28/80.
Apr. 28	Motion of Respondent to dismiss and alternative motion for summary judgment with brief, attachments and proof of service. DD 4/28/80.
Apr. 28	Motion of Petitioner Harless for bond pending appeal with financial affidavit. DD 4/28/80.
May 2	Affidavit of Corbin R. Davis, Deputy Clerk of Michigan Supreme Court re: delayed application for leave to appeal and etc., with proof of service. DD 5/6/80.

May 9	Order denying motion for bond pending appeal. DD 5/11/80. Cohn, J.
June 18	Return of Service on Charles Anderson, served on March 7/80. DD 6/1/80 (card).
July 18	ORDER OF REASSIGNMENT FROM JUDGE COHN TO JUDGE GILMORE. DD 7/21/80. Feikens, J.
1981	
Jan. 8	Opinion by Judge Horace W. Gilmore. DD 1/12/81. Gilmore, J.
Jan. 8	Order granting petition for a writ of habeas corpus. DD 1/1/81. Gilmore, J.
Jan. 8	Judgment that the petition for writ of habeas corpus is granted, unless the petitioner be retried by the State of Michigan within ninety (90) days. DD 1/12/81. Gilmore, J.
Feb. 5	Deft's application for stay pending appeal or, alternatively, application for issuance of an order pursuant to FRAP 23(c) for continued incarceration of Pltf, affidavit and brief and proof of service. DD 2/5/81.
Feb. 5	Deft's notice of appeal, sent copies to all parties with the docket sheet and proof of service. DD 2/12/81. pd. $70.00 (#25908)
Feb. 24	Order re: that the respondent's application for stay pending appeal of judgment of 1/8/81 ordering the release of Pltf from state custody is hereby GRANTED. DD 2/25/81. Gilmore, J.
Feb. 27	Appearance of Clinical advocacy program on behalf of Pltf, with proof of service. DD 2/27/81.
Mar. 3	Return of transcript order by appellant. (no transcripts necessary) DD 3/4/81.
Mar. 9	Return of the transmission form, verifying reciept of the file. DD 3/9/81.

STATE OF MICHIGAN
IN THE RECORDER'S COURT
OF THE CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v. JACK EVERETT HARLESS, Defendant.	R. C. No. 74-05346

OPINION

In the above-entitled cause the defendant, who stands convicted of Murder, Second Degree, has filed, in pro per, an Application for Leave to File a Delayed Motion for New Trial.

An examination of the file and record in this cause discloses that defendant's conviction was affirmed upon appeal to the Court of Appeals by opinion rendered October 10, 1977. Motion for re-hearing by the Court was denied by order dated November 15, 1977, and the Supreme Court denied leave to appeal by order dated June 22, 1979.

It is also noted that prior to its ruling on the merits of the appeal, the Court of Appeals considered and denied defendant's motion to remand to the trial court. While the file in the trial court does not contain a copy of the motion to remand, it is logical to deduce that the remand relief sought must have related to some form of trial court review before consideration by the Court of Appeals.

After examining and considering the content of defendant's delayed motion for leave to file a delayed motion for new trial, it is the opinion of this Court that the same does not contain any valid basis or justification for granting a new trial.

It is well established that any procedural error which does not result in a miscarriage of justice is not a ground for granting a new trial or reversal of conviction. *People* v. *Duffield* 20 Mich App 473, (1969) App 387 Mich 300.

The Court is not persuaded either that there was error committed in defendant's trial, or if so, that any miscarriage of justice resulted.

That being so, it would serve no useful purpose to grant leave as requested as the petition affords no basis for new trial, and no new trial will be granted. Additionally, it may be said that defendant's request for leave is not aided by the fact that the issues which he seeks to raise ought to have been raised on appeal.

Dated:

Robert L. Evans /s/
Judge of The Recorder's Court

ORDER DENYING MOTION FOR LEAVE TO FILE DELAYED MOTION FOR A NEW TRAIL

At a session of said Court in the Frank Murphy Hall of Justice at Detroit on Sep. 24, 1979.

PRESENT: HONORABLE ROBERT L. EVANS, Judge of The Recorder's Court

For the reasons recited in the foregoing opinion;

IT IS HEREBY ORDERED that the defendant's Motion for Leave To File a Delayed Motion for New Trial be, and same hereby is denied.

Robert L. Evans /s/
Judge of The Recorder's Court

DATED: Sep 24, 1979

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 21st day of June in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable
MARY S. COLEMAN,
Chief Justice.

CR 22-396

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v 61101 JACK E. HARLESS, Defendant-Appellant.	COA: 25710 LC: 74-05346

The Court of Appeals decision dated October 19, 1977, the Court of Appeals record, and the trial court record have been considered by the Court, pursuant to a letter request of the defendant under Administrative Order 1977-4, 400 Mich lxvii (1977), to determine whether leave to appeal or other relief should be granted by this Court.

The Court is not persuaded that relief should be granted and it is therefore DENIED.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of June in the year of our Lord one thousand nine hundred and seventy-nine.

[SEAL]

Corbin R. Davis, Deputy Clerk

[746]

[People v. Harless]
Opinion of The Court

Before: Beasley, P. J., and V. J. Brennan and J. R. McDonald,* JJ.

V. J. Brennan, J. Defendant Jack E. Harless was charged with the first-degree murder of Thomas Champagne and Tom Tillinger, contrary to MCLA 750.316; MSA 28.548. Defendant was tried on June 2, 1975, in Recorder's Court for the City of Detroit, and found guilty by jury verdict on June 9, 1975. Defendant was sentenced to life in prison on June 23, 1975. Defendant appeals as of right under GCR 1963, 806.1.

The charges against defendant arose out of an incident which occurred on July 12, 1974. At that point, an argument arose between defendant and Gerald Champagne and Tom Tillinger. Shortly afterward, Thomas Champagne became involved in the argument. Although testimony at trial was in

[747]

conflict, the fact seems clear that Thomas Champagne, Gerald Champagne and Tom Tillinger followed defendant to his home. Defendant entered his home and gunshots subsequently were fired from an upper window in the house. Thomas Champagne and Tom Tillinger were struck by the gun fire and fatally wounded.

At trial, certain photographs of the shooting scene were offered and admitted into evidence over defense objection by the trial court. The prosecutor later referred to these photographs in delivering his closing argument.

---

*Circuit judge, sitting on the Court of Appeals by assignment.

Upon conclusion of prosecution and defense arguments to the jury, the court gave instruction on the elements of first-degree murder, including the element of malice. The court phrased its charge in the following way:

> "Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion, but you must imply malice if you find death was implied by the use of a gun against another. The doing of a cruel act without excuse or justification."

The court also instructed on the difference between first-degree murder and second-degree murder. In distinguishing between the two, the court made the following statement:

> "If you find there was intentional killing of a human being without malice, but you find no contrivance, then you may find the Defendant guilty of Second Degree."

The court concluded its instructions by charging the jury on the lesser included offense of manslaughter. He also instruced on possible finding of [748] self-defense. After its deliberation, defendant was found guilty of first-degree murder.

On appeal defendant raises several allegations of error.

Defendant first contends that the trial court committed reversible error by instructing the jury incorrectly on the implication of malice that might be drawn from defendant's use of a deadly weapon, the effect of which was to remove the possible finding of manslaughter.

The trial court in its instruction to the jury provided them with a definition of malice in the following statement:

> "Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion, but you must imply malice if you find death was implied by the use of a gun against another. The doing of a cruel act without excuse or justification."

Defendant claims that this instruction was erroneous under *People v Martin*, 392 Mich 553, 560-562; 221 NW2d 336 (1974). The Court in *Martin* held that the law does not imply malice where a deadly weapon is used.

No objection was made to this instruction at the trial level. Consequently, we have held that a similar instruction will "not warrant reversal • • • absent a showing of manifest injustice". *People v Rosemary Gibson*, 71 Mich App 543, 552; 248 NW2d 613 (1976). See also *People v Cain*, 67 Mich App 433, 438; 241 NW2d 233 (1976). However, we also noted in *Gibson* that this standard "does not foreclose our reversal on an uncorrected instruction on a material matter • • • [i]f we find *Martin* error". *People v Gibson, supra*, at 552.

[749] What *Martin* intended to prevent was the possibility that the trial court would eliminate jury discretion concerning the fact question whether malice appeared simply by defendant's use of a deadly weapon. The Court found that whether malice arose from defendant's use of a deadly weapon was a permissible inference to be drawn from the evidence by the jury and not a legal presumption to be imposed on the jury by the trial court. Thus, where such presumption is raised *as a matter of law*, the Court found the jury effectively was precluded from consideration of a verdict of manslaughter. *People v Martin, supra* at 561.

We do not believe in this case that the instruction given to the jury prevented their factual determination of whether

malice existed or, consequently, whether manslaughter was a proper verdict. The court did not charge the jury that they must necessarily find malice from defendant's use of a deadly weapon. The instructions stated that malice "can be implied from using a weapon on another person. You are not obligated to reach the conclusion". Consequently, whether malice could be implied from defendant's use of a weapon was left to the jury to decide on the basis of the facts presented. They were not ordered to find malice simply because a deadly weapon was used. We do not believe the instruction given eliminated the jury's discretion to find an absence of malice, even though a weapon was used.

On the other hand, the charge in *Martin* conclusively removed the element of malice from jury consideration. The court charged *as a matter of law* that the use of a deadly weapon implies malice. Under these circumstances, no matter what the facts indicated to the jury, they were required to find malice. The court left no discretion, which [750] simply meant that the jury was legally prevented from considering a verdict of manslaughter. The situation in this case is clearly different. By leaving to the jury the freedom to determine from the facts that malice would not necessarily be implied from the use of a deadly weapon, the trial court did not remove possible consideration of a manslaughter verdict from the jury. See *People v Rosemary Gibson, supra,* at 551-554.

Defendant next contends that the trial court failed to properly instruct the jury on the elements of second-degree murder.

In charging the jury, the trial court at one point instructed in the following manner regarding the offense of second-degree murder:

> "If you find there was intentional killing of a human being without malice, that you find no contrivance, then you many find the Defendant guilty of Second Degree."

No objection to this instruction was made at trial. Consequently, we will reverse defendant's conviction on the basis of this alleged error only where manifest injustice appears. *People v Embree*, 70 Mich App 382, 383; 246 NW2d 6 (1976), *People v Snow*, 386 Mich 586, 591; 194 NW2d 314 (1972).

Though the trial court incorrectly characterized the offense of second-degree murder at this point in the instructions, he gave correct instruction on second-degree murder immediately afterward. He charged the jury there:

> "The difference between First and Second Degree Murder has to do with the presence of any premeditation in a contrived or advance plan for such action.
>
> • • •
>
> [751] The difference between First Degree Murder and Second Degree Murder is the difference in premeditation. They both require killing, malice aforethought, the difference being the element of premeditation."

Instructions were also given which clearly emphasized that the difference between second-degree murder and manslaughter is the element of malice.

Though the trial judge by obvious inadvertence incorrectly characterized second-degree murder as being accomplished "without malice", his clear and accurate instruction immediately afterward indicating malice as necessary to any finding of second-degree murder avoided the kind of distortion in the instructions fatal to informed consideration by the jury. See *People v Gray*, 57 Mich App 289, 297; 225 NW2d 733 (1975).

On the full instructional record, we do not believe defendant was denied a fair trial. *People v Goldsby*, 17 Mich App 16, 17; 168 NW2d 642 (1969). We find no manifest injustice.

Defendant contends that insufficient evidence existed to justify the jury in finding defendant guilty of first-degree murder.

We believe the record indicates ample evidence to warrant the jury verdict for first-degree murder in this case. *People v Palmer*, 392 Mich 370, 376-377; 220 NW2d 393 (1974). The evidence at trial fairly supported an inference of premeditation and deliberation. *People v Morrin*, 31 Mich App 301, 331; 187 NW2d 434 (1971), *lv den*, 385 Mich 775 (1971). See also the similar situation in *People v Folkes*, 71 Mich App 95, 99-100; 246 NW2d 403 (1976).

Defendant argues that the trial court committed reversible error by ruling admissible certain photo- [752] graphs of the scene over defense counsel's objection.

Like other demonstrative evidence, admission of photographs lies within the sound discretion of the trial court. *People v Doane*, 33 Mich App 579, 584; 190 NW2d 259 (1971). In this case, the trial court fully explained to the jury the differences in the condition of the house when photographed and the house when defendant was apprehended. Further, these changes did not destroy the substantial identity of the room. *People v Herrell*, 1 Mich App 666, 668; 137 NW2d 755 (1965). We find no error here.

Of defendant's claim that we should entertain a motion for new trial under MCLA 770.1; MSA 28.1098, we would only respond that the language of the statute allowing a court to grant a new trial to a defendant is manifestly limited to the trial court. As defendant made no motion in the trial court

for a new trial, we will not consider whether to grant the motion for new trial. *People v Folkes, supra,* at 100.

Having reviewed defendant's allegations of error and finding none persuasive, we sustain the jury conviction.

Affirmed.

STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, -vs- JACK E. HARLESS, Defendant-Appellant.	Docket No.: 25710 Recorder's Court No.: 74-05346

MOTION FOR RE-HEARING

NOW COMES JACK E. HARLESS, Defendant-Appellant, by and through his attorney, ROBERT L. ZIOLKOWSKI, and seeks a re-hearing of and from the decision of this Honorable Court dated, October 10, 1977. and for and in support hereof, states and shows to the Court of Appeals the following:

1. That the Defendant was tried on June 2, 1975, in the Recorder's Court for the City of Detroit, and found guilty by jury verdict on June 9, 1975, of First Degree Murder of one, THOMAS CHAMPAGNE and TOM TILLINGER, contrary to Michigan Compiled Laws annotated 750.316. The Defendant was sentenced to life in prison on June 23, 1975, and appealed as of right under GCR 1963, 806.1.

2. That by opinion of this Honorable Court, dated October 10, 1977, the aforementioned conviction of Defendant-Appellant was affirmed.

3. The Defendant-Appellant respectfully moves for a re-hearing of this case based on the contention that this Honorable Court erroneously concluded that the instruction in this cause in reference to the element of malice was not reversible

error pursuant to *People v. Martin*, 392 Mich 552; 221 NW 2d 336 (1974).

4. The trial court phrased it charge in the following way:

> "Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion but you *must imply malice* if you find death was implied by the use of a gun against another. The doing of a cruel act without excuse or justification." (Emphasis Added)

5. This Honorable Court in its written opinion, at page three, indicated that *People v. Rosemary Gibson*, 71 Mich App 543, 552; 228 NW 2d 613 (1976) does not foreclose a reversal on an uncorrected instruction on a material matter ". . . if we find *Martin* error . . ." *People v. Gibson*, supra at 552.

6. It is the contention of the Defendant-Appellant that the instruction in this cause, regarding malice, constituted that "Martin" error in that the instruction included the erroneous proposition that ". . . but you must imply malice if you find death was implied by the use of a gun against another." In the case at bar, death was obviously caused by the use of a gun and the instruction as cited of necessity was a mandate to the jury to find malice in this cause.

7. This Honorable Court in its written opinion, at page three, relies on the portion of the instruction which stated that "Malice can be implied from using a weapon on another person. You are now obligated to reach the conclusion that . . ." However, this Honorable Court completely ignores the crucial conclusion suggested by the trial court that if the jury finds a weapon was used, which by all testimony, including the admission of the Defendant himself, they must conclude they

are then directed by virtue of the instruction to imply malice in violation of the law as set forth in *People v. Martin*, 392 Mich 552. Thus it is the contention of Defendant-Appellant that "Martin" error exists which would cause a reversal of the conviction.

8. The Defendant-Appellant further contends that the instruction by the trial court regarding Second Degree Murder will also require re-hearing in that it would appear from the record that the trial court committed reversible error and that the error was not properly corrected by the trial court, thus providing the jury with the opportunity to preclude from consideration the charge of Second Degree Murder.

9. The trial court, at one point, instructed the jury regarding the offense of Second Degree Murder:

> "If you find there was intentionally killing of a human being *without malice*, that you find no contrivance, then you may find the Defendant guilty of Second Degree."

10. Despite lack of objection by counsel, this Honorable Court may reverse Defendant's conviction on the basis of the alleged error where manifest injustice appears. *People v. Embree*, 70 Mich App 382 (1976); *People v. Snow*, 386 Mich 586 (1972).

11. The Trial Court correctly charged the jury regarding Second Degree Murder at a later point in the trial, but made no specific reference correcting the previously erroneous charge, thus, allowing a jury to arrive at the erroneous conclusion that Second Degree Murder is accomplished without malice.

12. That merely stating the instruction correctly after giving an improper instruction in not sufficient to repudiate the

error and it has been held that the jury is presumed to have followed the erroneous instruction. *People v. Newmann*, 35 Mich App 193 (1971); *People v. Clark*, 340 Mich 411 (1954); *People v. Sangster*, 33 Mich App 712 (1971); *People v. Gilbert Johnson*, 52 Mich App 560 (1974).

WHEREFORE, Defendant-Appellant respectfully prays that this Honorable Court grant a re-hearing in this cause and reverse the conviction and remand this cause for new trial.

ROBERT L. ZIOLKOWSKI
Attorney for Defendant-Appellant
1223 First National Building
Detroit, MI 48226
961-4313
P22745

STATE OF MICHIGAN
IN THE COURT OF APPEALS
FOR THE STATE OF MICHIGAN

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, -vs- JACK E. HARLESS, Defendant-Appellant.	Docket No.: R/C No. 74-05346

APPELLANT'S BRIEF
ORAL ARGUMENT REQUESTED

ROBERT L. ZIOLKOWSKI
(P 22745)
Attorney for Defendant-Appellant
2800 Cadillac Tower
Detroit, Michigan 48226
961-1390

TABLE OF CONTENTS

		Page No.
I	Index to Cases Cited	I
II	Statement of Questions Involved	III
III	Statement of Facts	1-3
IV	Argument	4-29
V	Relief Requested	30

I

INDEX OF CASES CITED

Cases:	Page No.
Bruner v. Detroit United Railway, 173 Mich 146 (1912)	28
Finch v. W. R. Roach Company, 295 Mich 589 (1941)	29
Hunt v. Deming, 375 Mich 581 (1965)	25
People v. Bill, 19 Mich App 257 (1969)	25
People v. Burkard, 374 Mich 430	24
People v. Dawson, 29 Mich App 488, 491 (1972)	23
People v. Eggleston, 186 Mich 510	24
People v. Gill, 43 Mich App 598 (1972)	19
People v. Guillett, 342 Mich 1 (1955)	25
People v. Herell, 1 Mich App 666 (1965)	28
People v. Hoffmeister, 394 Mich 155 (1975)	18
People v. Johnson, 391 Mich 834 (1974)	7
People v. Rayford Johnson, 52 Mich App 385 (1974)	7
People v. Kanar, 314 Mich 242	24, 25
People v. Krogol, 29 Mich App 406 (1971)	27
People v. Liggett, 378 Mich 706, 714 (1967)	5, 21, 25
People v. Martin, 392 Mich 553 (1974)	4, 5
People v. MacPherson, 323 Mich 438 (1949)	21, 22, 25
People v. Meier, 47 Mich App 179 (1973)	17
People v. Midgyette, 49 Mich App 663 (1973)	27
People v. Morrin, 31 Mich App 301 (1971)	17

Cases: **Page No.**

People v. Newmann, 35 Mich App 193 (1971) 24, 25

People v. Obersteadt, 372 Mich 521 (1944) 25

People v. Price, 21 Mich App 694, 697 (1970) 21, 25

People v. Prinz, 148 Mich 307 (1907) 21, 25

People v. Reece, 9 Mich App 108 (1968) 22

People v. Sherman, 14 Mich App 720 (1968) 21

People v. Leonard D. Smith, 15 Mich App 173 (1968) .. 25

People v. Tolewitzke, 332 Mich 455 (1952) 21

People v. Visel, 275 Mich 771 (1936) 26

Perri v. Tassie, 93 Mich 464 (1940) 28

RULES AND STATUTES

MCLA 750.316 17

MCLA 768.29 21

MCLA 770.1 .....5, 6, 11

GCR 516.2 25

STATEMENT OF QUESTIONS INVOLVED

I

DID THE COURT ERRONEOUSLY INSTRUCT THE JURY, THUS PREJUDICING THE DEFENDANT AND ENTITLING HIM TO A NEW TRIAL?

Plaintiff-Appellee contends the answer should be no.
Defendant-Appellant contends the answer should be yes.

II

DID JUSTICE PREVAIL IN THE FIRST TRIAL?

Plaintiff-Appellee contends the answer should be yes.
Defendant-Appellant contents the answer should be no.

III

WAS SUFFICIENT EVIDENCE PRESENTED TO THE JURY DURING THE TRIAL TO JUSTIFY THE JURY IN FINDING THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT?

Plaintiff-Appellee contends the answer should be yes.
Defendant-Appellant contents the answer should be no.

IV

DID THE TRIAL COURT FAIL TO INSTRUCT THE JURY IN AN INTELLIGENT MANNER THEREBY DEPRIVING DEFENDANT-APPELLANT A FAIR TRIAL?

Plaintiff-Appellee contends the answer should be no.
Defendant-Appellant contends the answer should be yes.

V

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY RULING ADMISSIBLE CERTAIN PHOTOGRAPHS OF THE SCENE OVER OBJECTIONS OF COUNSEL?

Plaintiff-Appellee contends the answer should be no.
Defendant-Appellant contends the answer should be yes.

**Statement of Facts Omitted . . .

ARGUMENT

I.

DID THE COURT ERRONEOUSLY INSTRUCT THE JURY, THUS PREJUDICING THE DEFENDANT AND ENTITLING HIM TO A NEW TRAIL?

The defendant, JACK E. HARLESS, contends that the trial court erred in its instruction to the jury regarding the elements of the crime.

The defendant was charged with two counts of first degree murder. The court in its instruction to the jury also indicated to the jury that there were four possible verdicts against the defendant on each count: first degree, second degree murder, manslaughter or not guilty. (Vol. 6, p. 89)

The trial court then proceeded to define the elements of the crimes to the jury. (See Vol. 6, p. 90)

The court in its instruction described murder in the first degree as, "Murder is the killing with malice aforethought." (Vol. 6, p. 91) The Court differentiated Murder in the second degree with manslaughter by instructing the jury, "The difference between second degree murder and manslaughter has to do with the absence or presence, as the case may be, of the evidence of malice." (Vol. 6, p. 93)

The Court in its instruction to the jury provided them with a definition of *malice*. The Court stated:

> "Members of the jury, the term malice is a technical term which has to do with the doing of a cruel act against another human being without excuse or justification.

> ***Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person.*** You are not obligated to reach the conclusion, but you must imply malice if you find death was implied by the use of a gun against another. The doing of a cruel act without excuse or justification." (Vol. 6, p. 91) (Emphasis added)

The defendant contends that this instruction was erroneous. The Court in *People v. Martin*, 392 Mich 553 (1974) considered the instruction:

> "I charge you, if a man kills another suddenly without any warning, where a deadly weapon is used the law implies malice and the killing is murder."

The Court held in *Martin*, supra.;

> "The law does not imply malice where a deadly weapon is used. Michigan has long ago considered malice a permissible inference to be drawn by the jury rather than a presumption of law."

Furthermore, even though the defendant did not object to the charge, he is not foreclosed from a review since the trial court must not give an erroneous charge. *People v. Liggett*, 378 Mich 706 (1967).

Also, the court in *Martin*, supra., held that giving the erroneous instruction on malice:

> "effectively eliminated the verdict of manslaughter from the jury's consideration. The court charged as a matter of law that the use of a deadly weapon implied malice. The jury was left with no alternative other than to logically

deduce that since a deadly weapon was used, the defendant must be guilty of murder."

Therefore, the defendant contends that since he was not afforded a proper jury instruction, he respectfully submits that the trial court grant him a new trial. MCLA 770.1.

STATE OF MICHIGAN
IN THE COURT OF APPEALS
FOR THE STATE OF MICHIGAN

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff Appellee, -vs- JACK E. HARLESS, Defendant-Appellant.	Docket No. R/C No. 74-05346

MEMORANDUM IN SUPPORT OF APPELLANT'S APPLICATION FOR REMAND TO THE TRIAL COURT TO FILE DELAYED MOTION FOR NEW TRIAL

MC CALLUM & ZIOLKOWSKI
Robert L. Ziolkowski,
Attorney for Defendant-Appellant
22552 Gratiot Avenue
East Detroit, MI 48021
779-5280
State Bar No.: P22745

STATEMENT OF QUESTIONS INVOLVED

I

DID THE COURT ERRONEOUSLY INSTRUCT THE JURY, THUS PREJUDICING THE DEFENDANT AND ENTITLING HIM TO A NEW TRIAL?

Plaintiff-Appellee contends the answer should be no.
Defendant-Appellant contends the answer should be yes.

II

DID JUSTICE PREVAIL IN THE FIRST TRIAL?

Plaintiff-Appellee contends the answer should be yes.
Defendant-Appellant contends the answer should be no.

III

WAS SUFFICIENT EVIDENCE PRESENTED TO THE JURY DURING THE TRIAL TO JUSTIFY THE JURY IN FINDING THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT?

Plaintiff-Appellee contends the answer should be yes.
Defendant-Appellant contends the answer should be no.

ARGUMENT

DID THE COURT ERRONEOUSLY INSTRUCT THE JURY, THUS PREJUDICING THE DEFENDANT AND ENTITLING HIM TO A NEW TRIAL?

The defendant, JACK E. HARLESS, contends that the trial court erred in its instruction to the jury regarding the elements of the crime.

The defendant was charged with two counts of first degree murder. The court in its instruction to the jury also indicated to the jury that there were four possible verdicts against the defendant on each count: first degree, second degree murder, manslaughter or not guilty (Vol. 6, p. 89)

The trial court then proceeded to define the elements of the crimes to the jury. (See Vol. 6, p. 90)

The court in its instruction described murder in the first degree as, "Murder is the killing with malice aforethought." (Vol. 6, p. 91) The court differentiated Murder in the second degree with manslaughter by instructing the jury, "The difference between second degree murder and manslaughter has to do with the absence or presence, as the case may be, of the evidence of malice." (Vol. 6, p. 93)

The court in its instruction to the jury provided them with a definition of *malice*. The Court stated:

> "Members of the jury, the term malice is a technical term which has to do with the doing of a cruel act against another human being without excuse or justification. *Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person.* You are not obligated to reach the conclusion, but you must imply malice if you find death was implied by the use of a gun against another. The doing of a cruel act without excuse or justification." (Vol. 6, p. 91) (Emphasis added)

The defendant contends that this instruction was erroneous. The court in *People v. Martin*, 392 Mich 553 (1974) considered the instruction:

> "I charge you, if a man kills another suddenly without any warning, where a deadly weapon is used the law implies malice and the killing is murder."

The court held in *Martin*, supra.;

> "The law does not imply malice where a deadly weapon is used. Michigan has long ago considered malice a permissible inference to be drawn by the jury rather than a presumption of law."

Furthermore, even though the defendant did not object to the charge, he is not foreclosed from a review since the trial court must not give an erroneous charge. *People v. Liggett*, 378 Mich 706 (1967).

Also, the court in *Martin*, supra., held that giving the erroneous instruction on malice:

> "effectively eliminated the verdict of manslaughter from the jury's consideration. The court charged as a matter of law that the use of a deadly weapon implies malice. The jury was left with no alternative other than to logically deduce that since a deadly weapon was used, the defendant must be guilty of murder."

Therefore, the defendant contends that since he was not afforded a proper jury instruction, he respectfully submits that the trial court grant him a new trial. MCLA 770.1.

THE COURT: Bring in the jury. (Whereupon the members of the jury panel resumed their respective seats.)

[83] THE COURT: Despite some delays and interruptions, we have managed in what appears to be a normal time frame to finish the testimony and arguments in this case. The attorneys, in my judgment, committed themselves very well to their task of making the sort of presentation that will make the decision you have to make possible. It is, after all, the function of the attorneys in their own discretion to present facts and arguments that will guide you in your determination.

From that point of view, it is the function of the Prosecutor—the Prosecutor has to go forth with the evidence and prove his case beyond a reasonable doubt. He does have to put on evidence, the Defense does not have to do so. Sometimes the Defense feels the best defense is to proceed and that is what was done in this case.

You will note that the Defendant's wife didn't testify. The Prosecutor explained, correctly, under the law he didn't have the authority to call the Defendant's wife. The parties agreed the uncle was too ill to come to Court.

The Prosecutor called the [84] Defendant's son as a witness, obligated to do so, to call him as an available witness without regard to the nature of his testimony as the Prosecutor is duty bond to produce all witnesses that he is not prohibited by law in calling.

Attorneys have seen fit on two or three occasions to abate for you what the testimony was. On those occasions I have to advise you to decide what the testimony was. After all, eventually, that becomes your function. Your function in the law area exists only within the framework of these instructions. Yours is the duty to take the law as I give it to you now.

The law which may be different from what you think the law ought to be, certainly the law I give to juries is not what I think it to be, we are all bound by the precedents that have been involved in these kind of proceedings for a number of years. You must take the law as I give it to you.

You are charged to take it, the evidence, from the stand. You determine the facts and the verdict from the evidence that comes from the witness stand.

[85] There have been exhibits introduced. Those exhibits are available for you to take into the jury room after you have retired to the jury room. If you want something, considered as an exhibit, knock on the door and ask and we will send it to you.

In this case, the Defendant is presumed innocent. It is a principal of law in a criminal case, the Defendant is presumed innocent. He has a right to have you take all the testimony in the case within the framework of that presumption of innocence to attempt to harmonize that which you hear today and it is only legitimate that you determine guilt after you have attempted to harmonize the testimony taken in this case.

Presumption of innocence is a rebuttable one, it falls in the face of clear and convincing evidence. It falls if there is proof beyond a reasonable doubt as to the elements which go to make up the crime that I'll be describing for you in a moment. One way or other, though, the Defendant doesn't have to prove anything in a trial. The Prosecutor has the burden of proving the Defendant's guilt beyond a reasonable doubt. The Defendant [86] doesn't have to prove anything, the Prosecutor has to prove everything and he has to prove it beyond a reasonable doubt.

The burden of proof rests upon the People. The People

must prove by legal testimony and beyond a reasonable doubt a state of facts which will justify a conviction. Guilt is not to be lightly assumed from the proof, but it is to be clearly established, or as the law says, beyond a reasonable doubt.

In other words, the proofs in the case must be such as to clearly show the guilt of the Defendant and not be reasonable consistent with any other theory than that of guilt.

In considering this case, you should not go beyond the evidence to hunt for doubts, nor should you entertain such doubts as are merely fanciful or based upon groundless conjecture.

The Prosecutor must prove the case beyond a reasonable doubt, that doesn't mean he has to prove beyond any doubt. There are few things in life capable of absolute certainty. He has to prove the guilt of the Defendant beyond a reasonable doubt. A reasonable doubt is a doubt [87] based upon reason and common sense.

After you listen to the charge, if you can say you have a firm and abiding conviction of the guilt of the Defendant and you are fully satisfied of the truth of the charge, then you are satisfied beyond a reasonable doubt, then find the Defendant guilty.

If there is a doubt for which you can assess or assign a reason, your conviction or proof of the charge is not firm and abiding, then chances are you have a reasonable doubt. It is rare to have a jury that has difficulty with reasonable doubt. I don't think you will have trouble.

The Defendant is charged with two counts of First Degree Murder. The information I read to you from the outset and that I will reread to you alleges that on July 12, 1974, in front of 1228 Dragoon Street, in the City of Detroit, State of Michi-

gan, County of Wayne, that the Defendant, Jack Everett Harless did in Count I; feloniously, deliberately, willfully, with malice aforethought, and with premeditation, did kill and murder one, Thomas Champagne.

In Count II, it is alleged [88] at the same time and place that the Defendant, Jack Everett Harless, feloniously, deliberately, willfully, with malice aforethought and with premeditation did kill and murder one, Tom Tillinger.

There are two counts of First Degree Murder, two separate and distinct cases, in effect, for you to decide. When you finish and have arrived at a verdict, my Court clerk will ask you, reading the counts to you, how you find as to the Defendant in each of the alleged killings. The State statute with regard to murder reads as follows.

All murder which shall be perpetrated by means of poison, any kind of deliberate meditated killing, in arson, rape, robbery, burglary, etc., shall be murder in the first Degree and shall be punishable, all other kinds of murder shall be Murder in the Second Degree and shall be punishable.

The State law then does not define murder with any great deal of precision and we have to turn to the common law definition of murder to arrive at what it is all about. Murder from the common law definition is defined as the intentional killing of a human being with malice [89] aforethought and with premeditation.

The thing that distinguishes Murder in the Second Degree from Manslaughter is the presence or absence, from the evidence, of malice.

With regard to each of the two allegations against this Defendant on the alleged murder of Thomas Champagne, you

will, therefore, have four verdicts. Either he is guilty of Murder, First Degree, Second Degree, or Manslaughter, or he is not guilty.

The same will be true as to the allegation as to the person, Tom Tillinger. Either the Defendant is guilty of Murder in the First Degree, Second Degree, Manslaughter, or not guilty.

Turning, then, to the specific elements in the crime of Murder, there must first be shown by the Prosecutor proof beyond a reasonable doubt that there was a killing. Murder is necessarily a Homicide. Homicide is the killing of a human being. You must find some life and being ceased to be a being.

It is second necessary for the Prosecutor to prove beyond a reasonable doubt that that killing was intentional or that the means [90] by which the killing came about were means where an intention can be inferred or that such intent—such that the death was reasonable consequence of the act involved. Murder then is the intentional killing. The Prosecutor has to show that somebody was killed and that act was either done intentional with a design to take a human life or it must have been done in some circumstance where the intent to take a human life can be reasonably inferred or it must have been done in such a manner that death with a reasonable consequence of the acts that caused the death.

In this particular case in regard to the intentional killing or the alleged intentional killing, the Prosecutor argued that the use of a gun, the nature of the act, itself, is an act that carries a reasonable expectation of death.

You may determine in this case if death occurred as a result of the intentional use of a weapon, a gun—that the killing was done as a result of an intentional deliberate act.

You are obligated to take the nature of the act causing the death and determine whether or not death was a foreseeable consequence [91] of that particular conduct. Murder is the killing with malice aforethought. Malice, or the term malice, as used in murder, signifies an act done intentionally without legal justification or excuse.

Members of the jury, the term malice is a technical term which has to do with the doing of a cruel act against another human being without excuse or justification. The doing of a cruel act against another human being without excuse or justification. Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion, but you must imply malice if you find death was implied by the use of a gun against another. The doing of a cruel act without excuse or justification.

The last element in murder has to do with premeditation. I charge you, you should take that word in the most normal context. We are talking about a plan, thought out before, reason determined in advance. In this particular case, then, in order for the Defendant to be guilty of First Degree Murder, you must find there was intentional killing of a human being done with malice, [92] premeditation. Finding those four elements, you will find the Defendant guilty of First Degree Murder. Failing to find those four elements may lead to certain other consequences as far as your verdict is concerned.

If you find there was intentional killing of a human being without malice, but you find no contrivance, then you may find the Defendant guilty of Second Degree. The difference between Fiirst and Second Degree Murder has to do with the presence of any premeditation in a contrived or advance plan for such action.

While premeditation sometimes refers, itself, to planning done in advance, I further charge you with respect to the element of premeditation, it is not necessary for the premeditation to have been shown—premeditation is sufficient if only for a moment or two so long as you find in the evidence there was such time available for the Defendant if you find the other elements to have reflected such that he could have decided one way or another as to his actions.

The difference between First Degree Murder and Second Degree Murder is the differ- [93] ence in premeditation. They both require killing, malice aforethought, the difference being the element of premeditation.

Sometimes when there is a killing done suddenly, without premeditation as in Second Degree Murder, but done also as a result of great excitement, great provocation, the crime is reduced from Second Degree Murder to Manslaughter. The law contemplates in such circumstance the provocation may be such as to eliminate the element of malice from being a moving cause which caused the Homicide.

The difference between Second Degree Murder and Manslaughter has to do with the absence or presence, as the case may be, of the evidence of malice.

If you find in this case there was a killing, done during a moment of extreme excitement, extreme provocation, then you may find though such killing was intentional, under the definition, nevertheless, the act is not murder but is manslaughter. It is not ever provocation that will give rise to circumstances as will reduce the crime of Second Degree Murder to that of Manslaughter. [94] It must be such, the provocation must be such as would cause men of reasonable and average disposition to act rationally from passion rather than out of mature judgment. You must take whatever act you may see in the

evidence here and determine whether or not that act as perceived by the Defendant at the time was such as would provoke the reasonable human being to act in such a way as he may take a life acting from the passion rather than mature ordinary judgment.

In this case, if you find such an act done as a result of provocation, where the average reasonable person would have acted in the manner you find the Defendant acted; if you, under the proofs, find the Defendant did indeed take the lives in this case, then you may find him guilty of Manslaughter.

Four elements in the crime of Murder; the killing of a human being intentionally with malice aforethought and premeditation; without premeditation it may be Second Degree Murder; malice aforethought, or you may find in the absence of showing of malice brought on by sufficient provocation, that the act was Manslaughter; the fourth possible [95] element in this case is simply not guilty. That would come as a result of the failure of the Prosecutor to prove there was a killing or it was intentional within the context of reasonable foreseeable act causing death as I have described it to you.

Turning now to the Defense side of the ledger, the Defendant wins in one or two principal ways. First of all, if you should find there is a lack of sufficient proof as to reasonable doubt, you should give the Defendant benefit of such proof. There is affirmative defense in this case that you must all consider, that is the defense of self-defense.

In this case, however, it is relevant for you to understand at the outset the Defendant doesn't have to prove self-defense, the Prosecution has to prove it wasn't. The Defendant doesn't have to prove beyond a reasonable doubt that he acted in self-defense. A defense of self-defense having been raised, the Prosecutor is duty bond to prove to you, beyond a reasonable

doubt, that it was not self-defense. Keep that in mind as you deal with that separate affirmative defense. Self-defense is a right of a non-aggressor acting in a belief that he [96] himself, or others are in danger of death or significant bodily injury, who in good faith and under such reasonable belief strikes a force which causes the death of another. In striking such blow which causes the death of another, he must act reasonably and use such force as may be reasonable necessary.

There are four elements involved in self-defense. Self-defense is only available to a non-aggressor. In this case, you must look to the evidence to determine who was the aggressor at the time. If you find that the Defendant was the aggressor, then you may disregard the rest of this charge as to self-defense. Self-defense is not available to the aggressor.

If you find the Defendant was not the aggressor, then you should turn to the rest of the elements in self-defense. Keep in mind as to the first element to self-defense, self-defense is the right of a non-aggressor who acts in belief that he, himself—in this particular case it is alleged members of his family—were in danger of death or significant bodily injury; I mean danger at that moment, and you must look to the evidence in this case to find out whether or not the Defendant [97] as a reasonable person acting reasonably believed that he, himself, or members of his family were in danger, imminent danger of death or great bodily injury.

It is not the truth of the danger of the Defendant or the members of his family which is the pivotal question that you will have to assess here, but the Defendant's own reasonable belief that such was true. Yours is the duty to determine whether or not the Defendant believed it and whether or not if he believed it, whether or not that belief was reasonable.

If you find that the Defendant believed it but such beliefs,

based on the facts and circumstances the Defendant could have known under the circumstances were not reasonable, then the Defendant was not entitled to rely on self-defense. It was not the true fact of danger to himself or others that would give rise to the right to use a deadly force for the defense, but the Defendant's belief and the question of whether or not such belief was reasonable under the circumstances about which you will make the determination.

The Defendant must act in [98] good faith in asserting there was in his own reasonable belief danger to himself or danger to others, of significant bodily injury. Even if the Defendant believed this to be the situation, and even if that belief were reasonable under the circumstances, the last rule requires that the Defendant use only such force as is reasonably necessary under the cirumstances.

A Defendant may not kill unless killing is the only way to extricate himself or others from whatever danger was threatening him or others at the time.

The fourth rule with regard to self-defense: The amount of force must be reasonably calculated to the danger. The Defendant is duty bound to use reasonable force. Self-defense is the right of a non-aggressor acting in the reasonable belief of danger of death to himself or others, significant bodily injury, who acts in good faith to use force that is reasonably necessary under the circumstances.

To arrive at a verdict, you must be duty bound to evaluate the testimony. You have been evaluating direct testimony, witnesses [99] who testify about which they say they have seen, and you will be evaluating circumstantial testimony. Certainly, in making judgment as to reasonable beliefs or intent, you will be taking facts and circumstances in evidence in order to infer

an intent or to reach a fact conclusion by drawing certain inferences from other established facts.

I charge you, circumstantial evidence is as legitimate as direct evidence. You must take both kinds of evidence to reach such conclusions as seem reasonable to you under the circumstances.

The Defendant in this case has presented at least one character witness, I remember at least one character witness. I charge you the character of the Defendant is relevant in any Homicide case. You are to give such weight to character testimony as you believe is reasonable under the circumstances.

There has been at least one expert witness who testified in the case before you. The testimony of an expert is to aid and assist you in things of a scientific or technical nature. If it helps you to make your ultimate decision, the [100] conclusions that you will draw from the expert's testimony is entirely up to you.

The Defendant took the stand and testified in the case, he is entitled to do so. He is entitled to have you weigh the testimony by the same yardstick as the testimony you weigh of anybody else. If it is believable, you should give it the weight it deserves. If you find it is not believable, you should give it that kind of weight also.

Keep in mind the Defendant does not have to prove anything at all. The Prosecutor has the burden of proving the Defendant's guilt beyond a reasonable doubt.

You are the judges of the credibility of witnesses and the weight to be given their testimony. You may take into consideration their interests, bias or prejudice, if any; their relationship to the parties in the case, if any; the probability or the improbability of the story related by them and all other facts

and circumstances in evidence, which, in your judgment would add to or detract from their credibility or the weight to be given their testimony.

[101] In weighing the testimony of the witnesses, you have a right to consider their candor and fairness, their manner and bearing while testifying before you, the reasonableness of their story, the means and opportunity of knowing the facts about which they testify, the consistency of their testimony with other known facts in the case; and in all other matters that tend to impress your minds with the truth or untruth of their testimony.

If there is a conflict, you must remember who is telling the truth and who is lying. If you reject the testimony of any witness, you should have a reason.

Members of the jury, if you find some witness who appeared before you deliberately misstated the material fact, you may disregard the testimony in its entirety or believe the portion of the testimony which appears credible to you providing you have facts and circumstances corroborated in other facts and circumstances in this case.

Now, members of the jury, this is an important case, important to the People of the State of Michigan and important to the Defendant. The Court expects you will give it the same [102] kind of careful attention that you have exhibited during the course of this trial. As I said before, there are really eight possible verdicts. Four on each case.

With respect to Count I where the person allegedly killed was Thomas Champagne, he is guilty of Murder I, Murder II, Manslaughter, or he is not guilty.

With respect to Count II where the alleged victim was Tom

Tillinger, his is guilty of Murder I, Murder II, Manslaughter, or not guilty.

Take this case, members of the jury. You are under advisement to do your duty under oath. This case may have, from time to time, appeared to have excited some emotion. I trust you will not be guided by such emotion or anything that may have impressed you one way or another in a Courtroom. Make your decision from what you have heard from the witness stand.

By lot, my Court clerk will withdraw two of you.

THE CLERK: George Green. Lawrence Solo. (Whereupon the Court officer [103] is sworn at 2:55 o'clock p.m.)

THE COURT: It is your case. (Whereupon the members of the jury panel retire to the jury room to begin deliberations.)

THE COURT: Let the record show that at the bench I ordered my Court clerk to withdraw the name of the juror seated in Seat Number 1. He appeared to be asleep during the charge. I did so with the concurrence of both counsel.

MR. ZIOLKOWSKI: That is correct.

MR. O'HARA: That is correct. (Whereupon pursuant to deliberation, the members of the jury panel resumed their respective seats about 4:25 o'clock p.m.)

THE COURT: I knocked before you did. I don't know if your knock means you are responding or whether you have a verdict.

THE FOREMAN: I have the verdict.

THE COURT: Have you agreed [104] upon a verdict?

THE FOREMAN: We have, Your Honor.

THE COURT: Okay, have a seat.

THE CLERK: Answer to your names when called.

(Whereupon members of the jury panel respond, "Here" to their names when called.)

THE CLERK: (Continuing) What is your verdict?

THE FOREMAN: The verdict is guilty, First Degree Murder, on two counts.

THE CLERK: Members of the jury, hearken as to your verdict as recorded. You do say upon your oath you find the Defendant, Jack Everett Harless, guilty of Murder, First Degree as to Thomas Champagne and Tom Tillinger?

THE FOREMAN: Right.

THE CLERK: So say you, Mr. Foreman, and all members of the jury?

(Whereupon members of the jury panel indicate affirmatively.)

THE COURT: Do you want the [105] jury polled?

MR. ZIOLKOWSKI: Yes, sir.

(Whereupon each member of the jury panel indicated affirmatively to the question: Was this and is this your verdict.)

THE COURT: Do I understand from what you said to me through my Court clerk is that you find the Defendant, Jack Everett Harless, guilty of First Degree Murder of Thomas Champagne in Count I, and guilty of First Degree Murder of Tom Tillinger in Count II?

Let the record reflect the verdict is unanimous.

Opposition

Office - Supreme Court, U.S.
FILED
JUN 4 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2066

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLES E. ANDERSON, Warden,

Petitioner,

v.

JACK E. HARLESS,

Respondent.

_____/

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

William Burnham
Wayne State University Law School
468 W. Ferry
Detroit, Michigan 48202
(313) 577-3928/663-1240

Attorney for Respondent

QUESTIONS FOR REVIEW

I.

WHETHER RESPONDENT HABEAS CORPUS PETITIONER EXHAUSTED HIS STATE REMEDIES WHERE FEDERAL CONSTITUTIONAL AUTHORITY AND AN ANALYSIS IDENTICAL TO THAT ULTIMATELY ADOPTED BY THE FEDERAL COURTS IN GRANTING THE WRIT WERE BEFORE THE STATE APPELLATE COURT IN HIS DIRECT APPEAL?

II.

WHETHER THE COURT OF APPEALS DECISION PROPERLY HELD THAT RESPONDENT WAS DENIED DUE PROCESS WHEN IT DETERMINED, BASED UPON AN EXAMINATION OF THE JURY INSTRUCTIONS AS A WHOLE, THAT RESPONDENT'S JURY COULD HAVE INTERPRETED THE INSTRUCTION ". . . BUT YOU MUST IMPLY MALICE IF YOU FIND DEATH WAS IMPLIED BY THE USE OF A GUN AGAINST ANOTHER" AS A PRESUMPTION WHICH COULD HAVE RELIEVED THE PROSECUTION OF ITS BURDEN OF PROVING MALICE BEYOND A REASONABLE DOUBT OR AS A CONFUSING INSTRUCTION WHICH COULD HAVE MISLED THE JURY AS TO THE PROSECUTION'S BURDEN?

TABLE OF CONTENTS

	Page
QUESTIONS FOR REVIEW	1
INDEX OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT--REASONS FOR DENYING THE WRIT	6
I. THE SIXTH CIRCUIT COURT OF APPEALS' APPLICATION OF THE EXHAUSTION DOCTRINE BELOW IS FULLY IN ACCORD WITH ESTABLISHED PRECEDENT WHERE THE SUBSTANCE OF THE FEDERAL CLAIM WAS PRESENTED TO AND DECIDED BY THE STATE APPELLATE COURT	6
A. Sufficient federal constitutional authority and analysis were presented to the state Court of Appeals in Respondent's direct appeal	6
B. The Sixth Circuit Court of Appeals' opinion below is not in conflict with any of the Court of Appeals or Supreme Court cases cited by Petitioner.	11
II. THE DECISIONS IN SANDSTROM V. MONTANA, 442 U.S. 510 (1979); CUPP V. NAUGHTEN, 414 U.S. 141 (1973), AND CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967) DO NOT NEED "RECONCILIATION," NOR DOES THIS CASE PRESENT AN APPROPRIATE VEHICLE FOR REFINEMENT OF THE DOCTRINE IN ANY OF THOSE CASES.	14
CONCLUSION	20

INDEX OF AUTHORITIES

Cases	Page
Adickes v. Kress & Co. 398 U.S. 144 (1970)	18
Chapman v. California 386 U.S. 18 (1967)	5, 8, 14, 17, 19
Cool v. United States 409 U.S. 100 (1972)	8, 16
Cupp v. McNaughten 414 U.S. 141 (1973)	5, 14, 16, 17
Harless v. Anderson 504 F.Supp. 1135 (ED Mich 1981)	3, 7, 18
Henderson v. Kibbe 431 U.S. 145 (1977)	16
Hurtado v. California 110 U.S. 516 (1884)	13
In re Winship 397 U.S. 358 (1970)	6, 9, 14
Kentucky v. Whorton 441 U.S. 786 (1979)	16
Krzeminski v. Perini 614 F.2d 121 (CA 6,1980)	18
Mabry v. Klimas 448 U.S. 444 (1980)	13, 14
Maher v. People 10 Mich. 212 (1862)	9
Mullaney v. Wilbur 421 U.S. 684 (1975)	6, 9, 16
People v. Harless 78 Mich. App. 745; 261 NW2d 41 (1977)	3, 10
People v. Ligett 378 Mich. 706; 148 NW2d 784 (1967)	3, 8
People v. Martin 392 Mich. 553; 221 NW2d 336 (1974)	3, 8, 9
People v. McPherson 323 Mich. 438; 35 NW2d 376 (1949)	8, 11
People v. Wright 78 Mich. App. 246; 259 NW2d 443 (1977), aff'd 408 Mich. 1; 389 NW2d 1 (1980)	8, 10
Picard v. Connor 404 U.S. 270 (1971)	5, 6, 12
Pitchess v. Davis 421 U.S. 482 (1975)	13
Sandstrom v. Montana 442 U.S. 510 (1979)	6, 7, 8, 9, 10, 14, 15, 16, 17

Page

State v. Sandstrom
___ Mont. ___; 603 P2d 244 (1977) 17

United States v. Bollenbach
326 U.S. 607 (1946) 6, 7, 19

United States v. Frady
___ U.S. ___; 102 S.Ct. 1584 (1982) 19

Statutes:

MCLA 750.316; MSA 28.548 2

STATEMENT OF THE CASE

On January 12, 1974, at approximately 8:35 p.m. an argument took place between Respondent Jack Harless, Gerald Champagne and Tom Tillinger. Shortly thereafter, Thomas Champagne, Gerald's father, also became involved in the argument. During the course of the argument, Respondent Harless left the group and returned to his home. Thomas Champagne, Gerald Champagne and Tom Tillinger then followed Respondent to his home. Subsequently, shots were fired from an upper window of the Harless home, fatally wounding Thomas Champagne and Tom Tillinger.

At his trial in Detroit Recorder's Court, Respondent admitted the fact of the killings. Consequently, the trial focused upon the circumstances surrounding the actions of the Harless and Champagne families which led to the incident--actions about which there was conflicting testimony. There was evidence that a "neighborhood quarrel" had existed between the Harless and Champagne families for about two months prior to the shootings. In particular, there were continuing troubles between the children of the Harless and Champagne families--the teenage sons having been good friends and then having had a falling out. There was evidence of threats against Respondent and his family being made by Champagne family members, of their showing knives to Respondent, and of Thomas Champagne specifically telling Respondent that he would "take care of" him if Respondent persisted in calling the police about the continuing threats and about vandalism to the Harless home. (Tr. Vol. 5 p. 14).

In a statement made to the police immediately after the confrontation of July 12, Respondent indicated that he had fired the gun in reaction to the aggressive actions of the Champagnes on that day:

> My son Kenneth pulled the bike to this corner of the house and I walked to my porch and I looked down toward the Champagne house and I saw Tom

> Champagne carrying a baseball bat, Jerry Champagne carrying a knife and Tom Higgins [Tillinger] carrying a baseball bat. All three were coming toward my house. The old man, Tom, yelled at me, "you have been wanting trouble, now I'm going to beat your head in." I ran in my house and ran up to my bedroom which is upstairs at the front of the house. I got my .22 caliber automatic rifle out of my closet and went to the window . . . . As I looked out the window I saw my son Kenneth running on the south side of my house with the old man Tom chasing him with the baseball bat held back to swing at Kenneth, and I shot Tom Champagne . . . . (Tr. Vol. 5, pp. 14-15.)

In his lengthy charge to the jury, the trial judge give instructions on the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, the possible verdicts of first degree murder, second degree murder, manslaughter and not guilty on each count. In addition, the trial judge instructed the jury on Respondent's theory of defense of his son.

In regard to the element of malice, the key element which distinguishes second degree murder from manslaughter, and an essential element of first degree murder in Michigan, the trial court instructed as follows:

> Members of the jury, the term malice is a technical term which has to do with the doing of a cruel act against another human being without excuse or justification. The doing of a cruel act against another human being without excuse or justification. Malice is implied from the nature of the act which caused the death. Malice can be implied from using the weapon on another person. You are not obligated to reach the conclusion, but you must imply malice if you find death was implied by the use of a gun against another. The doing of a cruel act without excuse or justification. (Tr. Vol. 6, p. 91, emphasis supplied.)

There were no objections to the trial court's instruction. Respondent was convicted of first degree murder and, in accordance with the mandatory life sentence requirement of MCLA 750.316; MSA 28.548 (set forth on page 3 of Petitioner's Brief), on June 23, 1975, Respondent was sentenced to life in prison.

Respondent appealed his convictions as of right to the Michigan Court of Appeals, which affirmed. People v. Harless, 78 Mich. 745; 261 NW2d 41 (1977).

The Michigan Court of Appeals saw the issue raised as one of whether the instruction in question contravened the rule of People v. Martin, 392 Mich. 553; 221 NW2d 336 (1974)--a rule which was "intended to prevent . . . the possibility that the trial court would eliminate jury discretion concerning the fact question whether malice appeared simply by defendant's use of a deadly weapon." People v. Harless, 78 Mich. at 749; 261 NW2d at 43. As the Michigan Court of Appeals noted, "where such presumption [of malice] is raised as a matter of law," a jury is required to find malice to exist, thus "effectively . . . preclud[ing] . . . consideration of a verdict of manslaughter." People v. Harless, id. (emphasis by the Court) relying on People v. Martin, supra.*/

Having stated this rule, however, the Michigan Court of Appeals distinguished it from Respondent's situation, concluding:

> We do not believe in this case that the instruction given to the jury prevented their factual determination of whether malice existed or, consequently, whether manslaughter was a proper verdict.

People v. Harless, id.

Petitioner filed a letter requesting review by the Michigan Supreme Court. Such review was denied on June 21, 1979.

Subsequently, Respondent filed his habeas corpus petition in the United States District Court for the Eastern District of Michigan, which granted the writ on January 8, 1981. Harless v. Anderson, 504 F.Supp 1135 (E.D. Mich. 1981). The

---

*/ The federal constitutional underpinnings of People v. Martin, supra, and People v. Liggett, 378 Mich. 706; 148 NW2d 784 (1967), the other case cited to the Court, are discussed infra this brief at pp. 7-8.

District Court held that the jury could have interpreted the instruction as a presumption of malice from the use of a weapon, thereby unconstitutionally shifting the burden of proof to the defendant. Id. at 1137, 1138. This determination by the District Court was affirmed by the Court of Appeals for the Sixth Circuit in an opinion dated March 3, 1982, which noted further that the instruction was "garbled and confusing." Harless v. Anderson, ___ F.2d ___ (CA 6, March 3, 1982) (pp. 3a-8a of Petitioner's Appendix). Both federal courts determined that Respondent had exhausted his state remedies.

Respondent is currently free on bail on terms and conditions ordered by the District Court on July 6, 1981. See pp. 14a-15a of Petitioner's Appendix.

SUMMARY OF ARGUMENT

Respondent contends that certiorari should not be granted in this case because the federal District Court and Circuit Court of Appeals have correctly determined that Respondent exhausted his state remedies before filing his habeas corpus petition and that the jury instruction violated his due process rights. Further, Respondent contends that the circumstances of this case, in terms of both the exhaustion and the due process issues are so unique and unlikely to recur, that any decision on the merits on either issue would be of dubious value to the bench and bar.

1. On the exhaustion question, the Sixth Circuit correctly determined that Respondent exhausted the "substance" of his due process claim regarding the jury instruction in question as required by Picard v. Connor, 404 U.S. 270, 278 (1971). Sufficient federal constitutional authority was cited and the analysis urged upon and adopted by the state appellate court was the same one ultimately adopted by the federal courts in granting the writ. Further, contrary to Petitioner's assertion, the opinion of the Court of Appeals below is not in conflict either with controlling Supreme Court cases or with cases from other Circuit Courts of Appeal.

2. On the due process issue, the Sixth Circuit Court of Appeals correctly applied the holdings in Sandstrom v. Montana, 442 U.S. 510 (1979) and Cupp v. Naughten, 414 U.S. 141 (1973). There is no conflict between those two holdings nor between them and Chapman v. California, 386 U.S. 18 (1967). For this reason and others, including the fact that Petitioner never raised the issue of harmless error in the Court of Appeals, the petition for certiorari should be denied.

ARGUMENT--REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT COURT OF APPEALS' APPLICATION OF THE EXHAUSTION DOCTRINE BELOW IS FULLY IN ACCORD WITH ESTABLISHED PRECEDENT WHERE THE SUBSTANCE OF THE FEDERAL CLAIM WAS PRESENTED TO AND DECIDED BY THE STATE APPELLATE COURT

According to Picard v. Connor, 404 U.S. 270 (1971), exhaustion turns on whether the state court "had a fair opportunity to consider the issue encompassed in the habeas corpus claim." Id. at 276. In deciding this question in favor of exhaustion, it is sufficient that the substance of the federal claim was before the state court:

> We do not imply that respondent could have raised the equal protection claim only by citing "book and verse on the federal constitution." . . .We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts.

Picard v. Conner, supra at 278.

Respondent believes that the substance of his federal claim was fairly presented to the state court.

A. Sufficient federal constitutional authority and analysis were presented to the state Court of Appeals in Respondent's direct appeal

Respondent would concede that the papers filed in the Michigan Court of Appeals, and the analyses in the cases cited to that court, are not the paragon of specificity and organization. But in no event can they be characterized as claiming only that the "jury instruction was reversibly erroneous, without any reliance upon the constitution in support of that contention." Petitioner's Brief, p. 6. It is Respondent's position that the consitutional challenge to the jury instructions was made clear to the state by a combination of two factors: (1) citation and argument of the cases set forth in the excerpt from Respondent's state court papers reproduced on pp. 39a-53a of Petitioner's appendix, and (2) the fact that the analysis urged upon and adopted by the state court was precisely that employed in the Winship/Bollenbach/Mullaney/Sandstrom[1/] analysis

---

1/ In re Winship, 397 U.S. 358 (1970); United States v. Bollenbach, 326 U.S. 607 (1946); Mullaney v. Wilbur, 421 U.S. 684 (1975); Sandstrom v. Montana, 442 U.S. 510 (1979).

ultimately applied by the federal District Court and the Court of Appeals below.

(1)

Respondent will not repeat the correct analysis of the federal constitutional nature of the claims represented by the cases cited by Respondent in his state court papers, (See 4a-6a of Petitioner's Appendix.) Respondent feels, however, that that analysis is somewhat understated.

The principal case relied upon by Respondent in his state court papers, and by the State Court of Appeals in rejecting his claim, was People v. Martin, 392 Mich. 553; 221 NW 2d 336 (1974). As the Sixth Circuit opinion points out, the federal constitutional arguments therein were not "refined," but the Martin Court clearly understood the claims regarding all the instructions as having both state and federal constitutional underpinnings. Before proceeding to analyze the instructions involved, the Court in Martin characterized the claim as follows:

> In failing to properly explain the law, it is contended that the court denied defendant his right to a fair trial guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

392 Mich. at 553; 221 NW2d at 339.

In addition, the Martin Court relied upon and quoted United States v. Bollenbach, 326 U.S. 607, 612 (1946) for the proposition that "it is incumbent upon the court to guide the jury by providing a 'lucid statement of the relevant legal criteria'." Bollenbach was relied upon heavily by the federal District Court below and by this Court in Sandstrom v. Montana, 442 U.S. 510 (1979). See Harless v. Anderson, 504 F.Supp. 1135, 1137-1138 (E.D. Mich. 1981).[2/]

2/ Petitioner would presumably find Martin's citation of Bollenbach irrelevant since it was directed more at the juror confusion problem in that case than at any burden-shifting problem with the malice instruction. The inaccuracy of this rigid view at least for purposes of exhaustion in this case is shown by the prominent place of Bollenbach in burden-shifting cases and by the possibility of viewing the instruction in this case--as the Sixth Circuit did--as being "garbled and confusing" as well as burden-shifting. 7a of Petitioner's Appendix (6th Circuit opinion).

(See footnote cont. on next page.)

Petitoner fails even to mention the other case relied upon by Respondent's counsel in the state court papers: People v. Liggett, 378 Mich. 706; 148 NW2d 784 (1967) (48a of Petitioner's Appendix). See also, People v. Martin, 392 Mich. at 563 n. 6; 221 NW2d at 341 n. 6 (citing Liggett). In Liggett, the charge to the jury was confusing and the Court held that "the errors complained of were such as to deprive defendant of a fair trial 'by an impartial jury'"--at that point dropping a footnote: "[4]See U.S. Const. Am 6; . . . ." 148 NW2d at 788 (emphasis supplied). Cf. Cool v. United States, 409 U.S. 100, 104 (1972) (instruction which reduced burden of proof also violated Sixth Amendment jury trial right). Immediately following the quoted statement, as if to emphasize the federal constitutional basis for its holding, the Liggett court cited and quoted from Chapman v. California, 386 U.S. 18, 22, 25 (1967) in an effort to determine whether the federal constitutional defect was harmless error. It concluded the long quotation in relevant part with the following:

> Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that . . . the trial judge's instructions did not contribute to petitioner's convictions.

148 NW2d at 789, quoting Chapman v. California, supra at 25.[3/]

2/ (Footnote continued from previous page.)
This nexus between the confusing instruction issue and burden-shifting issue is carried forward in People v. Wright, 408 Mich. 1; 289 NW2d 1 (1980), where the Michigan Supreme Court struck down instructions very similar to those involved in Sandstrom. In describing a portion of the instruction which it believed the jury may have interpreted as a burden-shifting presumption as outlined in Sandstrom, the Michigan Court also noted:

> Perhaps the least severe of the criticisms leveled at the instruction is that it is "at best clumsy and, if taken alone, confusing." [citing cases]. A more accurate characterization of the instruction is that it "has the potential for misleading the jury with respect to the requirement that the government must prove every element of an offense beyond a reasonable doubt." [citing cases].

408 Mich. at 245, 289 NW2d at 8.

3/
Further, it is significant in showing the relationship between the Michigan statutory jury instruction requirements and the constitution that both People v. Martin and People v. Liggett rely upon People v. McPherson, 323 Mich. 438, 35 NW2d 376 (1949). See Martin, 392 Mich. at 562, n. 5, 221 NW2d at 341, n. 5, and Liggett, 378 Mich. at 714, 148 NW2d at 788. In McPherson, the Michigan Supreme Court observed that the statutory requirement that the trial court "'shall instruct the jury as to the law applicable to the case' must be construed in the light of constitutional guarantees designed to protect the rights of one accused of crime . . . " 35 NW2d at 381.

Perhaps more important than the fact that federal constitutional labels were urged upon the state court is the fact that the analysis of the instruction complained of was precisely the one used by this Court in Sandstrom v. Montana, 442 U.S. 510 (1979) and Mullaney v. Wilbur, 421 U.S. 684 (1975).

The due process analysis of presumption cases reasons from the holding in In re Winship, 397 U.S. 358 (1970). As applied to the instruction in the present case, the federal constitutional analysis would be as follows:

> 1. The prosecution must prove each and every fact constituting the crime against the defendant beyond a reasonable doubt.
>
> 2. Malice is an essential fact which the prosecution must prove to show murder in Michigan.
>
> 3. The challenged instruction could have been interpreted as presuming malice from proof of the use of a gun against another, thereby relieving the prosecution of its burden of proving that element beyond a reasonable doubt.

The long quotation in People v. Martin, supra, 392 Mich. at 561-562; 221 NW2d at 340-341 (set forth on pp. 8-10 of Petitioner's Brief) provides the analysis impliedly employed by the Michigan Court of Appeals in Respondent's state appeal. That analysis is drawn from Maher v. People, 10 Mich. 212, 218 (1862). Respondent submits that the analysis there set forth is precisely the same as that employed in Mullaney v. Wilbur, supra, and Sandstrom v. Montana, supra, and outlined above. Using the words of the seminal 1862 case quoted in Martin, the state court analysis would be as follows:

> 1. "[T]he burden of proof, as to each [fact constituting murder], rests equally with the prosecution . . . ."
>
> 2. "To give homocide the legal character of murder, . . . it must have been perpetrated with malice . . . ."
>
> 3. If a trial court "withdraw[s] the question from the jury by assuming to draw the proper inferences from . . . the facts proved, as presumption of law", "juries might be required to find the fact of malice where they were satisfied from the whole evidence it did not exist", thereby relieving the prosecution of its burden of proving malice.

The identity of analysis demonstrated above is relevant not only as an explanation for the failure to "refine" the claims separately as a matter of federal constitutional theory. It is also relevant to show the futility of remanding Respondent once again to the state court, since the result of the application of the analysis would be the same regardless of whether it is labeled federal due process or state common law. In terms of the policies behind exhaustion, this is perhaps more telling than a case presenting more "book and verse" and less identity of analysis.

A further reason why it would be futile to remand Respondent to state court is found in the specific reason why the Michigan Court of Appeals rejected his claim regarding the jury instruction at issue here. Respondent's argument was rejected because, in the words of the Michigan Court of Appeals, "[w]e do not believe the instruction eliminated the jury's discretion to find an absence of malice, even though a weapon was used." People v. Harless, 78 Mich. App. 745, 479; 261 NW2d 41, 43 (1977) (35a of Petitioner's Appendix). The state court, then, disposed of the claim on the threshold ground that the instruction did not embody a conclusive or burden-shifting presumption at all. By disposing of the claim in this manner, it became unnecessary for the state court to consider more precisely what federal constitutional (or state) rights the instruction would have violated had the court found it to contain the presumption Respondent argued that it did. Cf. Sandstrom v. Montana, 442 U.S. 510, 514 (1979) ("The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes.") The Michigan Court of Appeals is certainly capable of discussing the federal constitutional theory behind presumptions when it is necessary. See, e.g., People v. Wright, 78 Mich. App. 246; 259 NW2d 443 (1977), decided two months before Respondent's appeal was

decided; aff'd 408 Mich. 1; 289 NW2d 1 (1980). The view it took in this particular case simply made extended discussion unnecessary.

B. The Sixth Circuit Court of Appeals' opinion below is not in conflict with any of the Court of Appeals or Supreme Court cases cited by Petitioner

Petitioner cites cases from other Courts of Appeals as allegedly being inconsistent with the Court of Appeals' decision below. Respondent believes there is no conflict and that this assertion represents a misreading of the opinion below and the cited cases. Initially, it should be emphasized that there is nothing on the face of the Sixth Circuit's opinion (or for that matter, below the surface, as demonstrated above) which "eviscerates" the doctrine of exhaustion as claimed by Petitioner. Petitioner's Brief at 8. Petitioner has claimed that that opinion states that "all that is now necessary to meet the exhaustion requirements . . . is to rely on state precedent on an unrelated issue to the effect that a defendant has a 'right to have a properly instructed jury pass upon the evidence'." Petitioner's Brief at p. 10, quoting from Court of Appeals opinion (5a). No fair reading of that opinion would support this conclusion. In fact, Plaintiff ignores the first part of the sentence he quotes, which indicates that the statement in Martin was properly understood to have been made in response to the argument that defendant's "Sixth and Fourteenth Amendment rights to a fair trial had been abridged by an inadequate manslaughter instruction . . . ." 5a of Petitioner's Appendix. (Court of Appeals Opinion).[4/] Petitioner further ignores the fact that the Martin opinion supports its statement of a "right" to a properly instructed jury with a footnote reference to People v. McPherson, 323 Mich. 438; 35 NW2d 376 (1949), which held that the duty to instruct the jury properly must be read "in light of . . . constitutional guarantees."

4/ Plaintiff's claim that the issue is "unrelated" is dealt with in footnote 2/ supra this brief at pp. 7-8.

35 NW2d at 381. See footnote 3/ supra this brief at page 8 Petitioner also ignores the Martin Court's citation to People v. Liggett, supra (discussed supra this brief at page 8)--a case indisputably based upon the federal constitution.

Admittedly, the Sixth Circuit opinion does not specifically catalog all the citations to federal constitutional authority which were before the Michigan Court of Appeals in the Respondent's state appeal. Nevertheless,the opinion certainly makes it clear that what citation there was was adequate to present the substance of the claim. This fact alone distinguishes it from the situations in the cases cited by Petitioner.

Further, in none of the cases cited by Petitioner was there the identity of analysis, in combination with appropriate constitutional labels, that was involved here. For both these reasons, the cases cited by Petitioner fail to disclose any conflict between the opinion below and the other Circuit Courts of Appeals.

Petitioner also claims that the Court of Appeals' opinion below is not consistent with this Court's holding in Picard v. Connor, supra. The facts of Picard v. Connor, as well as its admonition that "book and verse on the federal constitution" are not required, 404 U.S. at . , show it to be a case supporting rather than defeating Respondent's position. It is certainly true, as Petitioner and Picard point out, that "[t]he claim that an indictment is invalid is not the substantial equivalent of a claim that it results in an unconstitutional discrimination." Total invalidity, whether on state statutory or constitutional grounds, means that the procedure was completely unauthorized or void ab initio. A discrimination claim is directed at the "results" of using the challenged procedure and asserts that those results are intolerable, not because of anything inherently wrong about the procedure, but because other procedures used for other people are more

favorable. Consequently, the Court of Appeals decision in Picard of necessity drew upon Massachusetts' "otherwise universal commitment to grand jury indictments in felony cases," 434 F.2d at 676, in determining that the lack of commitment to that procedure in the defendant's case resulted in an equal protection denial. Thus, a discrimination claim is analytically different from, and must draw upon very different data than, a claim that the whole procedure does not live up to a minimum constitutional or statutory standard.[5/]

By contrast, in the present case, even though the constitutional labels were not "refined," the analysis employed and data supporting or opposing the claim in the state Court of Appeals and in the federal courts below, were precisely the same.

The decision below does not conflict with the other two Supreme Court cases cited by Petitioner, Pitchess v. Davis, 421 U.S. 482 (1975) and Mabry v. Klimas, 448 U.S. 444 (1980). In both those cases the issue had never been presented to the state courts in any form before it was sought to be presented to the federal court. In Pitchess, the non-exhausted claim was whether defendant could be retried after it was determined that the physical evidence against him had been destroyed. Since the evidence was produced at his first trial, this issue was not raised at all on his direct appeal, 421 U.S. at 484 n. 1. Instead of going through a retrial and appealing the issue through the state courts, he sought to raise the issue by pretrial motion and immediate pursuit of a writ of prohibition in the state Court of Appeal. Relying upon the long established doctrine that the denial of an application for an extraordinary writ which does not

5/ Different ramifications for a losing state are apparent as well. Presumably the result of the Picard Court of Appeals' equal protection holding could be avoided by eliminating any necessity for grand jury indictments in all felony cases. Cf. Hurtado v. California, 110 U.S. 516 (1884).

operate as an adjudication on the merits does not serve to exhaust state remedies, this Court held that he had not exhausted the full appellate review that would be available to him as of right if he were convicted and pursued a direct appeal. Id. at 487.

Similarly, in Mabry v. Klimas, supra, the criminal defendant argued that he had exhausted as to an issue which had not been raised in any form in his direct appeal in the state courts. As part of its remedy for the lower court's county counsel-less convictions as bases for the defendant's recidivist sentence, the Supreme Court of Arkansas, revised the sentence to a lesser term. 448 U.S. at 445. The defendant filed in federal court contending that he was entitled to resentencing by a jury under revised minimum terms prescribed in a newly amended recidivist statute--a statute which had not yet been construed by the state court. Id. at 447.

II. THE DECISIONS IN SANDSTROM V. MONTANA, 442 U.S. 510 (1979); CUPP V. NAUGHTEN, 414 U.S. 141 (1973), AND CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967) DO NOT NEED "RECONCILIATION," NOR DOES THIS CASE PRESENT AN APPROPRIATE VEHICLE FOR REFINEMENT OF THE DOCTRINE IN ANY OF THOSE CASES

Petitioner asserts that the Court's decision in Sandstrom v. Montana, 442 U.S. 510 (1979) needs to be "reconciled" with Cupp v. Naughten, 414 U.S. 141 (1973) and Chapman v. California, 386 U.S. 18 (1967). It is Respondent's position that there is no conflict between the cited decisions and, even if "clarification" were desirable, this case is not an inappropriate vehicle for attempting it.

1. Sandstrom and Cupp v. Naughten

Both Sandstrom v. Montana, 442 U.S. 510 (1979) and Cupp v. Naughten, 414 U.S. 141 (1973) dealt with jury instructions which were alleged to have violated the rule of In re Winship, 397 U.S. 358 (1970). While the two cases reach different results, Respondent submits that they are fully consistent with each other.

In determining whether due process has been violated in such cases, a court must determine (1) whether the rule described by the instruction constitutes a presumption which shifts to the defendant, or otherwise relieves the prosecution of, the burden of proof placed on the prosecution by the ruling in Winship, (Sandstrom v. Montana, supra at 514);[6] and (2) whether the instruction could have been interpreted as a prohibited presumption by a reasonable juror who heard it. Id.[7]

In both Sandstrom and Cupp, then, the Court needed to determine the threshold issue of whether the instruction in question embodied a prohibited presumption at all. As to this issue, the Court in Cupp determined:

> Certainly the instruction by its language neither shifts the burden of proof nor negates the presumption of innocence.

414 U.S. at 148. As if to emphasize this determination, the Cupp Court noted that Winship "was a different case from that before us now." Id.

Sandstrom, on the other hand, reached the opposite conclusion with regard to the Montana instruction. After stating the issue as "whether the challenged jury instruction had the effect of relieving the state of the burden of proof enunciated in Winship on the critical question of petitioner's state of mind," the Court found that the instruction embodied either a conclusive or a burden-shifting presumption and, in either case, was unconstitutional under Winship. 442 U.S. at 521, 524. And, since the Court could not "be certain" that the jury did not ignore the presumption, it concluded that the giving of the instruction violated due process.

---

[6] "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes."

[7] "[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."

Petitioner would have us believe that Cupp and Sandstrom are somehow inconsistent with each other because of Cupp's admonition that jury instructions be reviewed in the "context of the overall charge." Cupp v. Naughten, supra at 146-147. Respondent submits that there is nothing in Sandstrom that relieves a court of this requirement. An adequate explanation of why the Sandstrom instruction violated due process, but the Cupp one did not, can be found in the Court's threshold determination that the Sandstrom instruction contained at least a burden-shifting presumption, while the Cupp instruction--even "by its language"--did not shift the burden of proof at all. Sandstrom, 442 U.S. at 424; Cupp, 414 U.S. at 148. Certainly, an instruction which, in Sandstrom terms, "could have been interpreted" by a reasonable juror as removing the prosecution's burden of proof on a contested essential element of the crime, 442 U.S. at 514, is also one which, in Cupp terms, "so infected the entire trial that the resulting conviction violates due process." 414 U.S. at 147.[8/] It certainly stands to reason that an instruction containing a rule which itself violates the constitution will be scrutinized with more care than an instruction which is not in and of itself unconstitutional or which omits something not otherwise constitutionally required. Compare: Sandstrom v. Montana, supra; Mullaney v. Wilbur, 421 U.S. 684 (1975) (burden-shifting instruction given), and Cool v. United States, 409 U.S 100 (1972) (accomplice instruction violated 6th Amendment and presumption of innocence) with: Cupp v. Naughten, supra; Henderson v. Kibbe, 431 U.S. 145 (1977) (causation instruction omitted but causation otherwise communicated to jury) and Kentucky v. Whorton, 441 U.S.

8/ The separate opinion of Justice Rehnquist--the author of the majority opinion in Cupp--concurring in the judgment and opinion in Sandstrom, supports this view. The opinion notes the Cupp "context of the overall charge" requirement, but defers to the majority's determination that due process was denied because the jury could have interpreted the instruction as a presumption. 442 U.S. at 527-528.

In addition, the Cupp opinion itself observes that the rule stated therein "does not mean that an instruction by itself may never rise to the level of constitutional error, see Cool v. United States, 409 U.S. 100 (1972) . . . ." 414 U.S. at 147.

786, 789 (1979) ("failure to give a requested instruction on presumption of innocence does not in and of itself violate the Constitution").

In any event, the present case is not an appropriate one to explore the "relationship" between Cupp and Sandstrom because the Court of Appeals applied the standards of both to the instruction in question. The Court of Appeals even substituted a second opinion dealing specifically with the Cupp issue in response to Petitioner's motion for rehearing. (6a-8a of Petitioner's Appendix). Respondent submits that that opinion correctly applies both Sandstrom and Cupp, leaving no basis on the facts of this case to "clarify the relationship between" them. Petitioner's Brief, p. 20.

2. Sandstrom and Chapman v. California

As the foregoing discussion indicates, Sandstrom v. Montana, supra, and Cupp v. Naughten, supra, deal with the question of whether there has been a violation of a defendant's due process rights. Chapman v. California, 386 U.S. 18 (1967), on the other hand, deals with the issue--given error of constitutional magnitude--whether that error was harmless beyond a reasonable doubt. Id. at 24.

Mere statement of the issues involved in the cases shows the lack of any conflict between Sandstrom and Cupp, on the one hand, and Chapman on the other. The Chapman harmless error rule is apparently applicable to, and certainly not inconsistent with, the burden-shifting instruction cases. See Sandstrom v. Montana, 442 U.S. at 526-527 ("The Montana court will, of course, be free to consider [the issue of harmless error] on remand if it so desires."); [9/] Cupp v. Naughten, 414 U.S. at 143 n. 2 (noting the disagreement below on whether the state had "met its burden of showing that the error was

---

9/ On remand, the Montana court determined that the error was not harmless. State v. Sandstrom, ___ Mont. ___ ; 603 P.2d 244 (1979).

harmless," but indicating that, "[i]n view of our disposition of this case [by a finding of no due process violation], we do not reach that issue.") See also, Krzeminski v. Perini, 614 F.2d 121 (CA 6 1980) (requiring that the harmless error rule be applied to burden-shifting jury instructions) and Harless v. Anderson, 504 F.Supp. 1135, 1139 (E.D. Mich 1981).

Even if there were some confusion about the relationship between Sandstrom and Chapman, the present case is not an appropriate one to "clarify the relationship between" them for two reasons.

First, the Petitioner failed to raise the issue of harmless error in the Court of Appeals below. In neither his main brief nor in his reply brief in the Court of Appeals, did Petitioner argue harmless error or mention Chapman v. California. This omission was clearly more than a simple oversight. The Sixth Circuit has clearly held that the Chapman harmless error rule does apply to burden-shifting jury instructions. Krzeminski v. Perini, 614 F.2d 121 (CA 6 1980). Further, the District Court below considered and rejected the possibility that the instruction at issue could have constituted harmless error. Harless v. Anderson, 504 F.Supp. 1135, 1139 (E.D. Mich 1981). This Court has on a number of occasions indicated that it "will ordinarily not consider" issues "neither raised before nor considered by the Court of Appeals." Adickes v. Kress & Co., 398 U.S. 144, 147 n. 2 (1970). To grant certiorari to consider the relevance of Chapman would contravene this practice even if this case raised an issue of harmless error.10/

Second, even if the issue had been raised in the Court of Appeals, it is clear that the District Court's determination that the error was not harmless was correct. Harless v. Anderson, 504 F.Supp. at 1139. The burden-shifting instruction related to malice, an essential element of the crime of murder in Michigan which the prosecution must prove beyond a reasonable doubt. Since Respondent admitted the killing, the sole issue

10/ Harmless error is omitted from Petitioner's statement of Questions Presented as well. See Supreme Court Rule 21.1(a).

at trial was his state of mind at the time. On the issue of malice, as noted by the District Court, the evidence was "contradictory." Id. As pointed out in Respondent's Statement of the Case, supra at pp. 1-2, the tragic incident was the culmination of two months of strife between the Harless and Champagne families.[11/] Though, in the words of Chapman v. California, 386 U.S. at 22, "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless," this is not one of them.[12/]

A final reason why this Court should not grant certiorari in this case is found in the nature of the instruction involved. As conceded by all, the offending language of the instruction is ultimately illogical. The only issue between the parties is the meaning which that language could have had. Two federal courts have already passed on this issue after considering the full record and have determined it in the respondent's favor. Because the instruction is grammatically non-sensical, it is highly unlikely that it or anything similar to it would appear in a future case. Consequently, a decision on the merits on such a unique set of facts would be of dubious value to the bench and bar.

11/ These facts alone (as well as others not here discussed) distinguish this case from United States v. Frady, ___ U.S. ___; 102 S.Ct. 1584 (1982) cited by Petitioner. Because this brief is not a response on the merits and the full record is not before the Court, Respondent's counsel do not at this time fully argue the issues of harmless error or the precise manner in which Respondent believes the instruction in question violated his due process rights.

12/ "'The influence of the trial judge on the jury is necessarily and properly of great weight,' . . . and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." United States v. Bollenbach, 326 U.S. 607 612 (1946).

CONCLUSION

For all the foregoing reasons, Respondent contends that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

William Burnham
Wayne State University Law School
468 W. Ferry
Detroit, Michigan 48202
(313) 577-3928/663-1240

Dated: June 3, 1982

NO. 81-2066

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLES E. ANDERSON, Warden,

Petitioner,

v.

JACK E. HARLESS,

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

Robert J. Glennon, Jr., being first duly sworn, deposes and says that, pursuant to Supreme Court Rule 28.3, 28.5(c), on the 3rd day of June, 1982, he served one copy of an Appearance and Motion for Leave to Proceed In Forma Pauperis, and three copies of a Brief in Opposition to Petition for Writ of Certiorari upon Stephen F. Schuesler, Assistant Attorney General, 774 Law Building, 525 West Ottawa Street, Lansing, Michigan 48913, by Express Delivery United States mail in Detroit, Michigan.

Further deponent sayeth not.

Robert J. Glennon Jr.
Robert J. Glennon, Jr.

Subscribed and sworn to before me
this 3rd day of June, 1982.

Notary Public
Washtenaw County, Michigan, acting in Wayne County
My commission expires June 11, 1984.

NO. 81-2066

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RECEIVED
JUN 4 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHARLES E. ANDERSON, Warden

Petitioner,

v.

JACK E. HARLESS,

Respondent.

MOTON FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Respondent Jack E. Harless, through his undersigned counsel requests leave to proceed in forma pauperis. This motion is based upon Supreme Court Rule 46, 18 U.S.C. § 3006A (d)(6), 28 U.S.C. § 1915, and the following considerations:

1. Respondent requested and was granted leave to proceed in forma pauperis in this cause by the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit.

2. On October 1, 1981, the undersigned was appointed to represent Respondent before the Court of Appeals for the Sixth Circuit, pursuant to the provisions of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A.

3. Although Respondent is now on bond, pursuant to Federal Rule of Appellate Procedure 23(c), he is unemployed except for odd jobs he performs from time to time, lives with his invalid wife whom he must care for, and has as his principal source of income Social Security benefits paid on the basis of his wife's disability.

WHEREFORE, Respondent asks leave to proceed in forma pauperis.

William Burnham
Wayne State University Law School
468 W. Ferry, Detroit, MI 48202
Business Phone: (313) 577-4827
Home phone: (313) 663-1240

Dated: June 2, 1982